SUPREME COURT OF THE UNITED STATES.

_____ TERM, _____

NO. _____

THE STEVIRMAC OIL & GAS COMPANY, a Corporation, - - - - - - - - - - - - - - - *Plaintiff in Error,*

vs.

C. E. DITTMAN, L. H. DITTMAN, J. A. DITTMAN and C. E. DITTMAN OIL AND GAS COMPANY, a Corporation, - - - - - - - - - - - *Defendants in Error.*

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE RALPH E. CAMPBELL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

C. E. DITTMAN, L. H. DITTMAN, J. A. DITTMAN and C. E. DITTMAN OIL AND GAS COMPANY, a Corporation, - - - - - - - - - - - - - - - - *Plaintiffs,*

No. 2080 ***vs.*** **Law**

THE STEVIRMAC OIL & GAS COMPANY, a Corporation, and VIRGIL HICKS, - - - - - - - - - *Defendants.*

In the District Court of the United States for the Eastern District of Oklahoma. C. E. Dittman, L. H. Dittman and J. A. Dittman, citizens and residents of the State of Pennsylvania, and the C. E. Dittman Oil & Gas Company, a corporation organized under the laws of the State of Delaware and domiciled in and a resident of the State of Delaware, Plaintiffs, v. The Stevirmac Oil & Gas Company, a corporation organized under the laws and domiciled in the State of Oklahoma and a citizen and resident thereof, and Virgil Hicks, a citizen and resident of the State of Oklahoma, Defendants.

Petition.

To the Honorable RALPH E. CAMPBELL, Judge of the District Court of the United States, for the Eastern District of Oklahoma:

C. E. Dittman, L. H. Dittman and J. A. Dittman, all of whom are citizens and residents of the State of Pennsylvania,

and C. E. Dittman Oil & Gas Company, a corporation organized in the State of Delaware and domiciled therein, a citizen and resident of the State of Delaware, plaintiffs, complain of the defendant, the Stevirmac Oil & Gas Company, a corporation organized in the State of Oklahoma and domiciled therein, and a citizen and resident of the State of Oklahoma and aver:

That the said plaintiffs, C. E. Dittman, L. H. Dittman, and J. A. Dittman are citizens and residents of the State of Pennsylvania and the C. E. Dittman Oil & Gas Company is a corporation organized in the State of Delaware and domiciled therein, and a citizen and resident of the State of Delaware; and the defendant, the Stevirmac Oil & Gas Company is a corporation organized under the laws of the State of Oklahoma and domiciled therein and is a citizen and resident of the State of Oklahoma, doing business at the City of Sapulpa, Creek County, Oklahoma.

That on the 17th day of December, 1912, by the consideration of the District Court of the United States, for the Western District of Pennsylvania, in a cause therein pending, in which your petitioners were complainants, and the said Stevirmac Oil & Gas Company was defendant and held at the City of Pittsburgh, Pennsylvania, which said Court was a Court of general jurisdiction and had full jurisdiction of the subject matter, and the persons and parties, recovered a judgment at No. 293, May Term, 1911, against the said, the Stevirmac Oil & Gas Company for the sum of $9,675.00 and $200.00 costs in and about their suit in that behalf expended; which said judgment still remains in that Court in full force and affect, in no wise reversed or annulled, or satisfied or set aside; yet the said defendant, though often requested so to do has not paid said several sums of money, or either of them or any part thereof to the said plaintiffs, and there is now justly due from the defendant to the plaintiffs therein, the sum of $9,675.00, with interest from the 8th day of June, 1912, and $200.00, costs.

A duly certified transcript of said judgment and the said proceedings is attached hereto, marked Exhibit "A", and made a part hereof.

That, that on the 22 day of August, 1913, there was issued out of said Court an execution, directed to the Marshall of the Western District of Pennsylvania, commanding him to levy on any property of the defendant found within his jurisdiction, which said execution was returned by said Marshall on the 2nd day of September, 1913, "*nulla bona.*"

A certified transcript of the record showing said execu-

tion and the return thereof is hereto attached, marked Exhibit "B", and made a part hereof.

Wherefore, your petitioners pray for judgment against the said defendant for the said sum of $9,675.00 and costs and interest thereon from June 8, 1912, and costs herein expended.

C. E. DITTMAN.

State of Pennsylvania, County of Greene—ss.

Personally appeared before me, a notary public, in and for said county and state, C. E. Dittman, who being duly sworn according to law says that he is one of the plaintiffs in the above styled action, and makes this affidavit on behalf of himself and his co-plaintiffs; that the statements therein contained are true and correct.

Sworn to and subscribed before me this 5th day of September, 1913. (Seal) Charles S. Carter, Notary Public. My Commission Expires Feb. 21st, 1915.

EXHIBIT "A".

In the District Court of the United States for the Western District of Pennsylvania. C. E. Dittman, L. H. Dittman, J. A. Dittman, a citizens of the State of Pennsylvania, and the C. E. Dittman Oil & Gas Company, a corporation, a citizen and resident of the State of Delaware, v. *The Stevirmac Oil & Gas Company, a corporation, a citizen and resident of the State of Delaware.—No. 293, May Term 1911. Wise & Minor, R. L. Crawford, Attorneys for Plaintiff; J. F. McNaul, D. B. E., George S. Ramsey, Attorneys for Defendant.*

EXEMPLIFICATION OF RECORD.

July 31st, 1911.

Cost of Exemplification, $6.25; Received Payment, Wm. T. Lindsey, Clerk.

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Among the rolls, records and judicial proceedings had in the District Court of the United States in and for the Western District of Pennsylvania at No. 293 of May Term, 1911, may be found the following words and figures, to-wit:

DOCKET ENTRIES:

C. E. Dittman, L. H. Dittman, J. A. Dittman, Bert Gellatley, and W. W. Pipes, all citizens of the State of Pennsylvania, and the C. E. Dittman Oil & Gas Company, a corporation, a citizen and resident of the State Delaware, vs. The Stevirmac Oil & Gas Company, a corporation, a citizen and resident of the State of Oklahoma. Wise & Minor, R. L. Crawford; J. F. McNaul, D. B. E., Geo. S. Ramsey.

Feb. 15th, 1911, Praecipe for summons filed.

Feb. 15th, 1911, Summons in trespass issued returnable to the first Monday of March next.

Feb. 16th, 1911, Writ returned served on defendant by handing to and leaving a true and attested copy thereof with H. H. McFann, President of said Company and Virgil Hicks, Secretary of said Company personally at Pittsburg, Pa., on February 15th, 1911.

Feb. 24th, 1911, Disclaimer and petition of Bert Gellatley and W. W. Piper, two of the plaintiffs herein, and rule to show cause why said plaintiffs should not be stricken from the record, entered and filed.

March 3rd, 1911, Praecipe for appearance D. B. E. of J. F. McNaul, attorney for defendant filed.

March 6th, 1911, Order as per argument docket making above rule absolute.

Feb. 1st, 1912, Statement filed.

Feb. 23rd, 1912, Plea and praecipe for issue filed.

May 8th, 1912, Praecipe for appearance of Geo. S. Ramsey filed.

June 3rd, 1912, This cause being at issue and a jury being called came; viz.: S. S. Fowler, Charles K. Blough, J. M. Miller, Caspar Hemeckle, John J. McCabe, George W. Campbell, Robert Fruit, Henry H. Adair, John G. Cochran, J. H. Lovell, W. D. Crawford and J. C. Davidson.

June 3rd, 1912, Trial proceeds.

Plaintiff's witnesses sworn: C. E. Dittman, Bert Gellatley, J. A. Dittman and J. W. Scheider and D. M. Dittman.

June 4th, 1912, Trial proceeds.

June 4th, 1912, Defendant's witnesses sworn: Virgil Hicks, W. W. Pipes, James A. Twichel, H. H. McFann and S. S. Owen.

June 5th, 1912, Trial proceeds.

June 6th, 1912, Trial proceeds.

June 6th, 1912, Motion for binding instructions refused.

June 6th, 1912, Plaintiffs' points filed and entered.

June 6th, 1912, Defendant's points filed and entered.

June 7th, 1912, Verdict in favor of the plaintiffs in the sum of $9,675.00, entered and filed.

June 8th, 1912, Motion for a new trial allowed to be filed.

June 8th, 1912, Motion for judgment *non obstante veredicto* allowed to be filed.

Nov. 2nd, 1912, Motion for judgment *non obstante veredicto* and motion for new trial argued. C. A. V.

November 7th, 1912, Evidence certified by the court and filed.

December 17th, 1912, New trial refused. *Per Curiam.*

December 17th, 1912, Motion for judgment for defendant *non obstante veredicto* overruled. *Per Curiam.*

December 17th, 1912, Counsel for defendant except to the action of the court in overruling the motion for judgment *non obstante veredicto*, and at their instance exception noted and bill sealed.

December 17th, 1912, Pursuant to the foregoing action of the court in overruling the motion for judgment *non obstante veredicto*, judgment is hereto entered in favor of the plaintiffs and against the defendant, the Stevirmac Oil & Gas Company, in the sum of nine thousand six hundred and seventy-five dollars ($9,675.00), the amount of the verdict.

William T. Lindsey, Clerk.

December 23rd, 1912, Bill of exceptions signed and sealed.

December 26th, 1912, Petition for writ of error and order allowing same filed and entered.

December 26th, 1912, Assignments of error filed.

December 27th, 1912, Writ of error issued.

December 27th, 1912, Citation awarded and issued.

December ...., 1912, Service of Citation accepted by ....

.....

In the Circuit Court of the United States in and for the Western District of Penn'a. C. E. Dittman, L. H. Dittman, J. A. Dittman, Bert Gellatley and W. W. Pipes, all cit-

izens of the State of Pennsylvania and The C. E. Dittman Oil & Gas Company, a corporation and resident of the State of Delaware, vs. The Stevirmac Oil & Gas Company, a corporation, a citizen and resident of the State of Oklahoma.—No. 293, May Term 1911. Trespass Suit.

PRAECIPE FOR SUMMONS.

To. H. D. Gamble, Esq.,

Clerk, U. S. Circuit Court, Pittsburgh, Pa.

Sir: Issue summons in trespass in above entitled cause *returnale* sec. reg., et sec. leg.

Wise & Minor,
R. L. Crawford,
Attorneys for Plaintiffs.

February 15th, 1911.

(Summons-9-10)

United States of America, Western District of Pennsylvania—ss.

THE PRESIDENT OF THE UNITED STATES,

To the Marshal of the Western District of Pennsylvania, Greeting:

We command you, that you summon The Stevirmac Oil & Gas Company, a corporation, a citizen and resident of the State of Oklahoma, late of your District, if it may be found therein, so that it be and appear before the Judges of the District Court of the United States, in and for the Western District of Pennsylvania, at a session of the same Court, to be holden at Pittsburgh, on the first Monday of March next, to answer C. E. Dittman, L. H. Dittman, J. A. Dittman, Bert Gellatley and W. W. Pipes, all citizens of the State of Pennsylvania and the C. E. Dittman Oil & Gas Company, a corporation, a citizen and resident of the State of Delaware in an action in trespass, and have you then and there this writ.

Witness, the Honorable, the Edward Douglass White, Chief Justice of the Supreme Court of the United States, at Pittsburgh, this 15th day of February, A. D. 1911, and in the 135th year of the Independence of the said United States.

(Seal.) H. D. Gamble, Clerk.

(On back:) No. 293, May Term, 1911, (Civil Docket.) District Court of the United States, Western District of Pennsylvania. C. E. Dittman, Oil & Gas Co. et al. vs. The Stevirmac Oil & Gas Co. Summons. Filed Feb. 15th, 1911, Wise & Minor, Chas. Crawford, Attorneys for Plaintiff.

(Form No. 282.)

RETURN ON SERVICE OF WRIT.

United States of America, Western District of Penn'a—ss.

I hereby certify and return that I served the annexed summons on the therein-named The Stevirmac Oil & Gas Company by handing to and leaving a true and attested copy thereof with W. H. McFann, President, and Virgil Hicks, Secretary of said Co., personally at Pittsburg, Pa., in said District on the 15th day of February, A. D. 1911.

E. Hadsell Porter, U. S. Marshal.

7-279 By Robt. McBurney, Deputy.

In the District Court of the United States for the Western District of Pennsylvania. C. E. Dittman, L. H. Dittman, and J. A. Dittman, citizens and residents of the State of Pennsylvania and The C. E. Dittman Oil & Gas Company, a corporation, a citizen and resident of the State of Delaware, Plaintiffs, vs. The Stevirmac Oil & Gas Company, a citizen and resident of the State of Oklahoma, Defendant.—No. 293, May Term 1911. (Circuit Court.)

DECLARATION.

1st. The plaintiffs C. E. Dittman, L. H. Dittman, J. A. Dittman and The C. E. Dittman Oil & Gas Company, claim of the defendant The Stevirmac Oil and Gas Company, the sum of fifteen thousand dollars ($15,000.00) with interest from the 10th day of January, 1911, upon the cause of action whereof the following is a statement:

2nd. The plaintiffs, C. E. Dittman, L. H. Dittman, and J. A. Dittman are citizens and residents of the Western District of Pennsylvania, and The C. E. Dittman Oil and Gas Company is a corporation organized under the laws of the State of Delaware, and a citizen and resident of the State of Delaware.

3rd. The defendant, the Stevirmac Oil and Gas Company, is a corporation under the laws of the State of Oklahoma, and a citizen and resident of the State of Oklahoma.

4th. On or before the 10th day of November, 1910, the said Stevirmac Oil & Gas Company was the owner of three (3) certain oil and gas leases, together with all the improvements thereon and appurtenances thereunto belonging, situate in Okmulgee County, Oklahoma, and described as follows, to-wit:

(a) Eliza Reynolds lease, dated September 28th, 1908, describing the Southwest Quarter of Section 26, Township 12 North, Range 13 East, containing 160 acres, bearing a one-eighth (1/8) royalty and running for a period of ten (10) years from date, and as much longer as oil and gas is produced.

(b) Jerry Reynolds lease, dated September 28th, 1908, describing the East Half of the Northeast Quarter of Section 27 and the Northeast Quarter of the Northeast Quarter of Section 34, Township 12 North, Range 13 East, and the Northwest Quarter of the Northwest Quarter of Section 31, Township 12 North, Range 14 East, containing 160 acres, bearing one-eighth (1/8) royalty and running for a period of ten (10) years from date, and as much longer as oil and gas are produced.

(c) Dave Reynolds lease, dated September 28th, 1908, describing the West Half of the Southeast Quarter of Section 26 and the West Half of the Northeast Quarter of Section 35, Township 12 North, Range 13, East, containing a one-eighth (1/8) royalty and running ten (10) years from date, and as much longer as oil and gas are produced.

5th. On November 15th, 1910, the said Stevirmac Oil and Gas Company entered into a contract in writing with one W. W. Pipes, and the plaintiff, C. E. Dittman, who was also acting for the plaintiffs, J. A. Dittman and L. H. Dittman and one Bert Gellatly for the sale of said oil and gas leases. A copy of said agreement is hereto attached, marked exhibit "A".

Said contract provided as follows:

(a) For the sale of said oil and gas leases to W. W. Pipes and C. E. Dittman, for the consideration of one hundred and seventy-five thousand dollars ($175,000.00) payable ten thousand dollars ($10,000.00) upon the execution of said contract, of which amount said C. E. Dittman, representing himself, L. H. Dittman, representing himself, L. H. Dittman, and J. A. Dittman, paid the sum of six thousand dollars ($6,000.00) and said Bert Gellatly and W. W. Pipes, each gave his check for two thousand dollars ($2,000.00), the balance of one hundred sixty-five thousand dollars ($165,000.00) was to be paid in monthly installments of five thousand dollars ($5,000.) each, the first installment payable in one month from the date of said contract, and one installment monthly thereafter; said payments to be evidenced by notes of the purchaser to the vendor, bearing interest at the rate of six per cent per annum.

(b) That said leases be transferred to Virgil Hicks of Sepulpa, Oklahoma, as trustee to hold and dispose of same as thereinafter set out.

(c) That at any time after the vendor received fifteen thousand dollars ($15,000.00) under said agreement, should any of said notes mature and remain unpaid for thirty days, the vendor may declare said remaining notes due and payable, and if all are not paid within fifteen days thereafter, the vendor shall have the option to return to the purchasers all the money they have paid to the vendor in excess of fifteen thousand dollars ($15,000.00) and declare the contract null and void and the rights of the purchasers terminated.

(d) The gross proceeds from the property conveyed, whether from sale of oil or otherwise shall be collected by the trustee, and if the purchasers are not in default, shall be turned over to the purchasers, provided that if any note matures shall not be paid when due, the trustee may place any moneys in his hands, or a sufficient amount thereof, to the payment of said note, remitting the remainder to the purchasers; and all operating and developing expenses may be paid by the trustee and out of said funds.

(e) The trustee shall be required to give a bond in the sum of ten thousand dollars ($10,000.) for the faithful performance of his trust.

(f) The purchasers agree to form a corporation to take over the other interest in the said agreement, and notes of the corporation, to be formed, were to be accepted by the vendor in lieu of the notes given by the purchasers which were to be returned.

6th. That while said contract was in the name of C. E. Dittman and W. W. Pipes, as purchasers, yet it was the understanding and agreement that they hold it for themselves and the plaintiffs, J. A. Dittman, L. H. Dittman, and for Burt Gellatly in equal shares. The copy of the agreement between said parties in reference thereof is hereto attached, marked "Exhibit B"; that your plaintiffs C. E. Dittman and J. A. Dittman, each paid one-fifth (1/5) of the first payment of ten thousand dollars ($10,000.) or two thousand dollars ($2,000.) each, and they were informed, and at the time believed that said Bert Gellatly paid a like sum of two thousand dollars ($2000), and that W. W. Pipes paid a like sum of two thousand dollars ($2,000.00); and that when the first of said notes became due on the 10th day of December, 1910, the plaintiffs C. E. Dittman, J. A. Dittman and L. H. Dittman each paid the further sum of one thousand dollars ($1,000.) and they were

informed, and at the time believed that Burt Gellatly and W. W. Pipes each paid the further sum of one thousand dollars ($1,000.00) and said note was returned.

7th. That pursuant to the terms of said agreement, on the 16th day of November, 1910, said C. E. Dittman, W. W. Pipes and Burt Gellatly, formed a corporation under the laws of the State of Delaware, called The C. E. Dittman Oil & Gas Company, by Articles of Association duly filed in the office of the Secretary of the State of Delaware, with an authorized capital stock of three hundred thousand dollars ($300,000.00) divided into 6000 shares at fifty ($50.00) each; that said Company thereafter duly organized, and C. E. Dittman was elected president and W. W. Pipes secretary; that said Company commenced business with a capital stock of one hundred twenty-five thousand dollars ($125,000.00), being 2500 shares of fifty ($50.00) dollars each, which stock was issued as follows:

To C. E. Dittman	500 shares
J. A. Dittman	500 shares
L. H. Dittman	500 shares
Burt Gellatly	500 shares
W. W. Pipes	500 shares

In consideration of the assignment of the said corporation of contract and agreement with The Stevirmac Oil & Gas Company. That said Company executed and turned over to the said Stevirmac Oil and Gas Company, thirty-three notes of five thousand dollars each, and received from the said company thirty-three notes of like amount, which had been executed by C. E. Dittman and W. W. Pipes.

8th. The plaintiffs further aver that the execution of the said contract and the payment of the said sums of money was procured by false and fraudulent representations on the part of The Stevirmac Oil and Gas Company and its officers and agents, that H. H. McFann President and Virgil Hicks Treasurer, of the said Company, being largely interested in the said Company, and owning a majority of the stock thereof, falsely and fraudulently represented to the said C. E. Dittman, who was acting for himself and L. H. Dittman, and J. A. Dittman that the said oil territory embraced in said leases, and the five (5) producing wells thereon had a daily production of over 400 barrels and a total monthly production of over 12,000 barrels of oil. They also falsely and fraudulently represented to said plaintiff that the territory in the Westward, South and Southeast of the said leases had never been tested, or drilled upon, and when they conducted said plaintiff C. E. Dittman, who was a stranger to, and unfamiliar

with said territory, and who relied upon their representations, over the said territory, they took him by a route or way by which he was unable to see or discover wells that had been drilled and had come in dry holes, thereby condemning the said property for oil and gas purposes.

9th. The plaintiffs further aver that the said representations and statements were wholly false and fraudulent, and intended to deceive, and did deceive the plaintiffs; that in truth and in fact said leases, and the five wells thereon, at the time of said sale did not produce 400 barrels per day, and did not produce 12,000 barrels per month, and that the total daily production did not exceed 215 barrels per day; that the territory to the Westward, South and Southeast of said leases had been fully tested by the drilling of wells, which were either dry holes or small gas wells of no market value, and said territory had been condemned as oil producing property, which fact was well known to the defendant company and its officers.

10th. The plaintiffs further aver that said Stevrimac Oil & Gas Company, and its officers and agents, and said W. W. Pipes, combining and confederating together with intent to cheat and defraud plaintiffs, and induce them to purchase said property at a large and excessive price, did falsely and fraudulently pretend and state to the plaintiffs, that said W. W. Pipes paid his share of the first payment of the purchase money of said property, to-wit, the sum of two thousand dollars ($2,000.), and also paid his share of the first note of five thousand dollars, to-wit, the sum of one thousand dollars ($1,000.00); whereas in truth and in fact said W. W. Pipes did not pay either of said sums or any part thereof; but with intent to induce the plaintiffs to enter into said contract and pay their share of said consideration, the officers of said Stevirmac Oil and Gas Company pretended to have received from W. W. Pipes, his share of said money, and they either did not cash his checks for said amounts or furnish said W. W. Pipes the money to meet them, or returned his checks to him unpaid.

That possession of the oil territory mentioned in the agreement was turned over to the agents of the plaintiffs November 10th, 1910, but under the terms of the contract the monthly reports of the oil runs were made to Virgil Hicks, the trustee named in the said agreement; that after the plaintiffs went into possession of said territory they learned for the first time that the territory adjoining the land, mentioned in the agreement, had been thoroughly tested for oil and gas purposes; but numerous wells which had proved to be either dry holes or such slight producers as to be worthless, and that

by such drilling a large portion of the territory mentioned in the agreement, was condemned or worthless for oil and gas purposes; that they learned when the monthly reports came in, for the production for the month of November, that the territory instead of producing 400 barrels per day, as had been reported to them, and 12,000 barrels per month, did not produce more than 215 barrels per day, and the monthly production did not exceed 6,500 barrels per month. Thereupon said plaintiffs refused to pay the 2nd note, which came due on the 10th day of January, 1911, and demanded that the defendant, The Stevirmac Oil & Gas Company annul and surrender said contract and return to the plaintiffs the said sum of nine thousand dollars ($9,000.) which had been paid by the plaintiffs, and expenses incurred up to that time by the plaintiffs.

That the said defendant failed and refused to return said amount, but after the bringing of this suit, said defendant company took possession of the said oil territory, the oil wells, machinery and oil thereon and ejected the plaintiffs from their possession thereof; that they have received and retain all moneys received for the sale of all the oil produced during the time plaintiffs were in possession of said leases, and have failed and refused to account to the plaintiffs for the same, or any part thereof.

The said plaintiffs further aver that by reason of the false and fraudulent representations on the part of the said defendant, its officers and agents, and the said W. W. Pipes, and by their falsely and fraudulently pretending that the said W. W. Pipes, was paying equal part or share with the other plaintiffs of said purchase money which representations the plaintiffs aver were false and fraudulent and were made with intent to deceive, and did deceive the said plaintiffs, and to induce them, the said plaintiffs, to pay for said property at a large and excessive price, much more than the said property, in truth and in fact, was worth, they were induced to purchase the same, and to pay therefor, the said sum of nine thousand dollars ($9,000.00) together with a large amount of money by way of expenses, in looking after, developing and operating the said tract, by reason whereof they were damaged in the said sum of fifteen thousand dollars ($15,000.00) for which amount they bring suit.

R. L. Crawford,
Wise & Minor,
Attorneys for Plaintiffs.

Western District of Pennsylvania, City of Pittsburg—ss.

Before me Clerk of the Court in and for the State above named, personally appeared C. E. Dittman, one of the plaintiffs above named, who being duly sworn according to law deposes and says, that the facts set forth in the foregoing declaration are true and correct.

C. E. Dittman.

Sworn to and subscribed before me this 1st day of February, 1912. H. D. Gamble, Dep. Clerk, U. S. District Court.

"Exhibit A."

SALE AGREEMENT.

Agreement made and entered into by and between the Stevirmac Oil & Gas Company, a corporation of Sapulpa, Oklahoma, hereinafter styled the Vendor, party of the first part, and W. W. Pipes, of 812 Union Bank Building, Pittsburgh, Pennsylvania, and Charles E. Dittman of Waynesburg, Greene County, Pennsylvania, hereinafter styled the purchasers, parties of the second part.

Witnesseth:

(1) The vendor hereby sells to the purchasers and the purchasers hereby buy from the vendor Oil & Gas mining lease, together with all the improvements thereon and appurtenances thereunto belonging situate in Okmulgee County, Oklahoma, and described as follows, to-wit:

(a) Eliza Reynolds lease, dated September 28th, 1908, describing the Southwest Quarter of Section 26, Township 12 North Range 13 East, containing 160 acres, bearing a one-eighth (1/8) royalty and running for a period of ten (10) years from date, and as much longer as oil and gas is produced.

(b) Jerry Reynolds lease, dated September 28th, 1908, describing the East Half of the Northeast Quarter of Section 27 and the Northeast Quarter of the Northeast Quarter of Section 34, Township 12 North, Range 13 East, and the Northwest Quarter of the Northwest Quarter of Section 31, Township 12 North, Range 14 East, containing 160 acres, bearing one-eighth (1/8) royalty and running for a period of ten (10) years from date, and as much longer as oil and gas are produced.

(c) Dave Reynolds lease, dated September 28th, 1908, describing the West Half of the Southeast Quarter

of Section 26 and the West Half of the Northeast Quarter of Section 35, Township 12 North, Range 13, East, containing 160 acres and bearing one-eighth (⅛) royalty and running ten (10) years from date, and as much longer as oil and gas are produced.

(2) The consideration for the above purchase and sale is the sum of one hundred seventy-five thousand dollars ($175,000.00) paid by the purchasers to the vendor as follows:

(a) Ten thousand dollars ($10,000.) cash at the execution thereof, the receipt of which is hereby acknowledged.

(b) The remaining one hundred sixty-five thousand dollars ($165,000.00) shall be paid in monthly installments of five thousand dollars ($5,000.00) each the first thereof to be due and payable one month from date hereof and monthly thereafter until the full amount has been paid; said deferred monthly payments of five thousand dollars each to be evidenced by notes of the purchasers to the vendor bearing even date herewith and drawing interest at the rate of six per cent (6%) per annum from date.

(3) The vendor shall within fifteen days from date hereof transfer the above described leases and property by good and valid conveyance to Virgil Hicks of Sapulpa, Oklahoma, trustee and said trustee shall hold and dispose of same as hereinafter set out.

(4) The purchasers agree with the vendor to pay all notes promptly, as they mature, and if any of said notes mature and are not paid within thirty days, prior to the time the vendor has received fifteen thousand dollars ($15,000.00) under this agreement, the vendor may declare all of said notes remaining unpaid due and thereupon all so same shall immediately become due and payable, and if all of same are not paid within fifteen days thereafter the vendor may declare this contract null and void and the rights of the purchasers terminated and may retain all moneys which it has received hereunder free from the claim of the purchasers and consider it as and for an option to buy.

(5) At any time after the vendor has received fifteen thousand dollars ($15,000.00) under this agreement should any of the noted above mentioned mature and remain unpaid for a period of thirty days the vendor may declare the whole of said remaining notes due and payable and they shall there-

upon become due and payable, and if all of same are not paid within fifteen days thereafter the vendor shall have the option to return to the purchasers all the money they have paid to the vendor in excess of fifteen thousand dollars ($15,000.00) and declare this contract null and void, and the rights of the purchasers terminated, or it may proceed at its discretion to collect whatever may remain unpaid and subject the property herein described to such payment.

(6) The groos proceeds from the property hereby conveyed, whether derived from the sale of oil or otherwise, shall be collected by the trustee and if the purchasers are not in default and have complied with the terms and conditions of this agreement, shall by the trustee be immediately turned over to the purchasers monthly on or before the fifteenth of the month for the collections during the *proceeding* month.

(7) Said leases shall be operated in a business-like and skillful manner and the personal property shall be kept in good repair and wells in condition to produce their full capacity.

(8) Producing wells on adjoining properties shall at all times be offset within sixty (60) days from the date of completion of the well to be offset.

(9) In the event any note above mentioned shall not be paid when due, the trustee may apply any moneys in his hands, or a sufficient amount thereof, to the payment of said note, remitting the remainder thereof to the purchasers.

(10) All development and operating expenses shall be paid by the purchasers, but in the event the operating expenses are not paid monthly and remain unpaid for thirty days, then the trustee may pay same out of any funds in his hands derived from the property.

(11) The purchasers shall not suffer or permit any valid lien or liens to attach to any of said property and in the event any lien should attach and not be removed by the purchasers within sixty days, the trustee may apply any moneys which may come into his hands to the satisfaction of such lien.

(12) The vendor agrees to place the purchasers in quiet and peaceful possession of said property at the date hereof and to defend said possession against all lawful claims and demands of any persons arising prior to the date hereof.

(13) The trustee hereunder may be removed and a new trustee substituted at any time by agreement of the parties hereto or for good cause shown.

(14) The trustee is hereby made the agent of the vendor and the purchasers for the collection of revenue arising from said property including the sale of oil, and is hereby authorized to execute division and sale orders and such other instruments as may be necessary for carrying out his trust duties.

(15) The purchasers shall pay all taxes and assessments against said property during the existence of this agreement arising after the date hereof.

(16) The field management of said property shall be under the joint control of the trustee hereunder and some one selected by the purchasers.

(17) The trustee shall upon the final payment to the vendor of the purchase price, execute a good and valid assignment of the property herein described to the purchasers or to whomsoever the purchasers shall designate.

(18) The trustee hereunder shall be required to execute in favor of the vendor and the purchasers a good and valid bond in the sum of ten thousand dollars ($10,000.00), guaranteeing the faithful performance and discharge of the trust duties herein imposed.

(19) The purchasers agree to forthwith organize a corporation to take over their interest in this agreement and to forthwith begin the sale of the stock of said corporation and agree to pay to the vendor the amount received from the sale of said stock less twenty (20%) per cent, for selling until all of said deferred payments are paid as fast as the stock is sold, but in any event payments shall be made at the rate of five thousand dollars ($5,000.00) per month, and it is hereby understood and agreed that upon the proper organization of a company or incorporation as herein mentioned, the vendor shall accept the legal notes of said company upon equal terms and conditions except as to date, in lieu of or exchange for the notes of the purchasers or vendees named in this contract, which notes of vendees or purchasers shall be returned to them.

(20) The vendor shall turn over the property to the purchasers at the date hereof, free and clear of all debts and encumbrances, but shall be entitled to retain any earnings of the property until the date hereof.

(21) The vendor hereby warrants the title to the above described property and covenants to defend*and* same against the lawful claims of any and all persons.

(22) This agreement shall become operative when executed by the parties hereto and the trustee herein accepts the trust hereby imposed and shall extend to and be binding upon the original parties, their heirs, executors, administrators, successors and assigns, the same having been duly and legally authorized by the vendor Company.

In Witness Whereof, The Stevirmac Oil & Gas Company has caused its name to be subscri*n*ed hereto by its president, H. H. McFann, and its treasurer, Virgil Hicks, and attested to by its secretary S. S. Owen, under its corporation seal, and the purchasers have hereunto set their hands and seals this 10th day of November, A. D. 1910.

Stevirmac Oil & Gas Company,
By H. H. McFann, President, and
Virgil Hicks, Treasurer.

Attest: S. S. Owen, Secy. (Seal)

W. W. Pipes,
Charles E. Dittman.

I, Virgil Hicks of Sapulpa, Oklahoma, hereby accept the trust imposed by the above and foregoing agreement entered into on the 10th day of November, 1910, between the Stevirmac Oil & Gas Company and W. W. Pipes and Charles E. Dittman.

Witness my signature this 10th day of November, 1910.

Virgil Hicks.

Exhibit "B".

MEMORANDUM.

Whereas, the undersigned parties are all owners with equal interest in a certain oil and gas plant situate in Okmulgee County, Oklahoma, purchased from the Stevirmac Oil & Gas Company under a contract entered into by W. W. Pipes and C. E. Dittman as purchasers, and

Whereas, Burt Gellatly, J. A. Dittman and L. H. Dittman are equal owners and purchasers in said contract and have paid their equal proportions of the purchase money up to date, now therefore this is to witness that this fact is fully understood and agreed to between all the parties hereto who propose to form an incorporated company as provided in said contract.

Witness our hand and seal this 10th day of November, A. D. 1910.

W. W. Pipes (Seal)
C. E. Dittman (Seal)
Burt Gellatly (Seal)
J. A. Dittman (Seal)

Witness: R. L. Crawford.

PLEA.

And now, February 23rd, 1912, comes defendant, The Stevirmac Oil & Gas Company, by counsel, and pleads not guilty. J. F. McNaul, Attorney for Defendant.

PRAECIPE FOR ISSUE.

Put the above entitled cause on the Issue Docket. R. L. Crawford, Wise & Minor, Attys. for Plaintiffs.

DISCLAIMER AND PETITION TO STRIKE NAME OF CERTAIN PARTIES PLAINTIFF FROM RECORD AND RULE TO SHOW CAUSE.

To the Honorable the Judges of said Court:

The petition of Burt Gellatly and W. W. Pipes respectfully represents:

That on February 19th, 1911, at the above numbered and term of your Honorable Court, one C. E. Dittman caused to be issued a writ in trespass in which your petitioners were named as parties plaintiffs. Your petitioner Burt Gellatly being therein named as Bert Gallatly.

That your petitioners were joined therein as parties plaintiff by said C. E. Dittman without any authority from them and without their consent, nor did they employ counsel to represent them in said proceedings.

That they were unaware of the issuing of said writ or the bringing of said suit and that they are not parties thereto and did not desire or permit their names to be used as parties plaintiff, nor have they any interest in said proceedings.

Therefore, they pray that their names may be stricken from the record in said cause, so that they may be no longer parties therein and that they may recover from the said C. E. Dittman their costs in said behalf most unjustly sustained.

And they will ever pray.

W. W. Pipes,
Burt Gellatly,
By Charles F. Patterson, Their Attorney.

United States of America, Western District of Penn'a—ss.

Burt Gellatly, one of the petitioners above named, being duly sworn according to law deposes and says that the statements contained in the foregoing petition are true and correct as he verily believes.

Burt Gellatly.

Sworn and subscribed before me this 23rd day of February, 1911. (Seal) Hugh M. Stilley, Notary Public. My com. exp. Jan. 28th, 1915.

ORDER.

And now, to-wit, February 24th, 1911, the within petition presented in open court and upon consideration thereof a rule is granted to show cause why the names Burt Gellatly and W. W. Pipes should not be stricken from the record as parties plaintiff, returnable sec. reg. *Per Curiam.*

EXCERPT FROM ARGUMENT LIST.

March 6th, 1911, Rule made absolute. *Per Curiam.*

VERDICT.

We find for the plaintiff in the sum of nine thousand six hundred and seventy-five dollars ($9,675.00).

Samuel S. Fowler, C. K. Blough, J. M. Miller, C. C. Helmheckel, John J. McCabe, Geo. W. Campbell, Robert Fruitt, Henry N. Adsit, John G. Cochran, J. H. Dovell, W. D. Crawford, J. C. Davidson.

MOTION EX PARTE DEFENDANT FOR JUDGMENT IN ITS FAVOR NON OBSTANTE VEREDICTO.

And now, to-wit, June 8th, 1912, counsel for defendant having upon the trial of said cause presented to the court a point requesting binding instructions in favor of the defendant, which point was refused by the court, now comes and moves the court to certify all the evidence taken upon the said trial, and for judgment in favor of the defendant *non obstante veredicto* upon the whole record for the following reasons:

1: Plaintiffs failed to establish the particular cause of action sued upon.

2: Plaintiffs failed to establish misrepresentation of any material fact.

3: The whole record shows that the material facts inducing the sale, were stated truly.

4: Without regard to the form of the action, plaintiffs could not recover back the part of the purchase money paid, in the absence of a showing on their part of a tender to defendant of that which had been acquired by them, the plaintiffs, under the contract.

J. F. McNaul,
Burleigh & Challener,
Attorneys for Defendant.

ORDER.

And now, to-wit, June 8th, 1912, within motion presented in open court and a rule is granted on plaintiffs to show cause why judgment should not be entered in favor the defendant, *non obstante veredicto.* *Per Curiam.*

MOTION EX PARTE DEFENDANT FOR A NEW TRIAL.

And now, to-wit, June 8th, 1912, comes the defendant by its counsel, and moves the court to grant a rule on plaintiffs to show cause why a new trial should not be granted in the above entitled case, for the following reasons:

1: The Court erred in refusing each and all of the defendant's points for charge, said points being numbered from one to twelve both inclusive.

2: The Court erred in affirming the plaintiffs' points.

3: The verdict is against the weight of the evidence.

4: The verdict is excessive, according to the theory upon which the case was tried, in that the jury made no allowance under the Court's instructions for the eleven hundred dollars ($1100.00) which the defendant paid to, or deposited in, the name of the plaintiff company.

5: The Court erred in refusing to instruct the jury that even though there was a representation made that the production of the wells amounted to four hundred (400) barrels daily, but that if the jury found that the oil run statement produced and given to plaintiffs, was a correct statement, in itself, the plaintiffs had no right to conclude that the daily production from the wells amounted to four hundred (400) barrels.

6: The Court erred in failing to strike out of the caption the names of the individual plaintiffs, thereby preventing defendant from moving to dismiss the case

for want of jurisdiction, which jurisdiction is not real but is only made to appear by the improper joinder of said individuals as plaintiffs.

J. F. McNaul,
Burleigh & Challener,
Attorneys for Defendant.

ORDER TO SHOW CAUSE.

And now, June 8th, 1912, the within motion presented in open court and a rule is granted on plaintiffs to show cause why a new trial should not be granted in the above entitled case.

Per Curiam.

EXCERPT FROM ARGUMENT LIST.

Nov. 2nd, 1912, Motion for Judgment *non obstante veredicto* and for new trial argued. C. A. V.

December 17th, 1912.

New Trial refused. *Per Curiam.*

Motion for judgment *non obstante veredicto* refused.
Per Curiam.

Counsel for defendant except to the above action of the court in overruling the motion for judgment *non obstante veredicto* and at their instance exception noted and bill sealed.

JUDGMENT.

And now, December 17th, 1912, Pursuant to the foregoing action of the Court in overruling the motion for judgment *non obstante veredicto*, judgment is hereby entered in favor of the plaintiffs, and against the defendant, the Stevirmac Oil & Gas Company, in the sum of nine thousand six hundred and seventy-five dollars ($9,675.00), the amount of the verdict.

William T. Lindsey, Clerk.

PLAINTIFF'S WITNESS BILL.

J. W. Sheilder, attendance and mileage	$13.00
D. N. Dittman, attendance and mileage	34.00
W. W. Pipes, attendance and mileage	40.80
R. L. Hoskinson, attendance and mileage	12.00
Serving subpoenaes, 4 witnesses	2.00
Mileage subpoenaes, 4 witnesses	20.40
L. D. Iams, Bill	20.00
½ bill for meals for jury, $6.50	3.25
	$145.45

C. E. Dittman.

A List of Judgments entered upon the records of the Court of the United States, for the Western District of Pennsylvania, at Pittsburgh, since the 14th day of February, A. D. 1911, at four o'clock P. M.

No., 293. Term, May. Year, 1911. Defendant, Stevirmac Oil & Gas Company. Plaintiffs, C. E. Dittman Oil & Gas Co., C. E. Dittman, L. H. Dittman and J. A. Dittman. Date of Judgment, Dec. 17, 1912. Debt., $9,675.00. Interest From, June 7th, 1912. Costs, $200.00. Attorney, Wise and Minor, R. L. Crawford. Remarks, ...

In testimony whereof, witness my hand and the seal of said Court this 31st day of July, A. D. 1913, at four o'clock P. M. (Seal) WM. T. LINDSEY, *Clerk.*

In the District Court of the United States, for the Western District of Pennsylvania. C. E. Dittman, L. H. Dittman, J. A. Dittman, all citizens of the State of Pennsylvania and the C. E. Dittman Oil & Gas Company, a corporation a citizen of the State of Delaware, v. *The Stevirmac Oil & Gas Company, a corporation, a citizen and resident of the State of Oklahoma.—No. 293, May Term 1911.*

Western District of Pennsylvania—ss.

I, William T. Lindsey, Clerk of the District Court of the United States, for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburgh, in said district.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said Court, at Pittsburgh, this 31st day of July, A. D. 1913.

(Seal) WM. T. LINDSEY, *Clerk.*

Western District of Pennsylvania, ss.

I, James S. Young, District Judge of the United States, for said District, do hereby certify that William T. Lindsey, above named, was, at the time of making the above certificate, and is now, Clerk of the said Court, and that the said certificate made by him is in due form of law.

JAMES S. YOUNG, *U. S. District Judge.*

Pittsburgh, July 31st, 1913.

Western District of Pennsylvania—ss.

I, William T. Lindsey, Clerk of the District Court of the United States for the Western District of Pennsylvania, do

certify that the Honorable James S. Young, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, Judge of the District Court of the United States in and for said District, duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought to be given, as well in the Courts of Judicature as elsewhere.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, in said District, this 31st day of July, A. D. 1913.

(Seal) WM. T. LINDSEY, *Clerk.*

EXHIBIT "B".

United States, Western District of Pennsylvania—sct.

THE PRESIDENT OF THE UNITED STATES,

To the Marshal of the Western District of Pennsylvania, Greeting:

We Command You, That of the goods and chattels, lands and tenements, in your District of Stevirmac Oil & Gas Company, late of your District, you cause to be made and levied, as well as a certain debt of nine thousand six hundred and seventy-five dollars ($9,675.00) which C. E. Dittman Oil & Gas Company in the District Court of the United States in and for the Western District of Pennsylvania, in the Third Circuit, before the Judges of the said Court, by the consideration of the same Judges, lately recovered against the said Stevirmac Oil & Gas Company as the sum of two hundred dollars ($200.00) which to the said C. E. Dittman Oil & Gas Company in the said Court was in like manner adjudged, for its costs and damages which it had sustained by occasion of the detention of that debt, whereof the said Stevirmac Oil & Gas Company is convict as appears of record. And have you those moneys before the said Judges, at a session of the same Court, to be holden at Pittsburgh, on the first Monday of September next, for the debt and damages aforesaid: and have you then there this Writ.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, at Pittsburg, this 22nd day of August, A. D., 191. ., and in the 138th year of the Independence of the United States.

(Seal) WM. T. LINDSEY, *Clerk.*

(On back:) Fi. Fa. No. 3 Oct'r. Term, 1913. Orig. No. 293 May Term, 1911. C. E. Dittman, et al., vs. Stevirmac Oil and Gas Company. Debt, $9675.00; Int. from June 7th, 1912, ...; Att'y, $20.00; Clerk, $9.50; Mar. on Summons, $2.00;

Mar. on Ex., ... Wise & Minor. Filed Sept. 2nd, 1913, Wm. T. Lindsey. Clerk.

Came to hand 10 A. M., Aug. 22nd, 1913. Marshal Docket No. 5120. Sept. 2nd, 1913. This Writ returned *Nulla Bona.* So answers E. Headsell Porter, U. S. Marshal.

CERTIFICATE OF EXEMPLIFICATION.

In the District Court of the United States, for the Western District of Pennsylvania. C. E. Dittman et al. v. *Stevirmac Oil & Gas Company.—No. 293, May Term 1911.*

Western District of Pennsylvania—ss.

I, William T. Lindsey, Clerk of the District Court of the United States, for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the Fi. Fa. returned and filed Sept. 2nd, 1913, in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburg, in said district.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, this 26th day of September, A. D. 1913.

(Seal) WM. T. LINDSEY, *Clerk.*

Western District of Pennsylvania—ss.

I, James S. Young, District Judge of the United States, for said District, do hereby certify that William T. Lindsey, above named, was, at the time of making the above certificate, and is now, Clerk of the said Court, and that the said certificate made by him is in due form of law.

JAMES S. YOUNG, *U. S. District Judge.*

Western District of Pennsylvania—ss.

I, William T. Lindsey, Clerk of the District Court of the United States for the Western District of Pennsylvania, do certify that the Honorable James S. Young, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, Judge of the District Court of the United States in and for said District, duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought to be given, as well in the Courts of Judicature as elsewhere.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, in said District, this 26th day of September, A. D. 1913.

(Seal) WM. T. LINDSEY, *Clerk.*

(On back:) No. 293 May Term 1911. District Court of the United States, Western District of Pennsylvania. C. E. Dittman et al. vs. Stevirmac Oil & Gas Company. Certified Copy of Fi. Fa.

Endorsed: Filed Oct. 4, 1913, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 4th day of October, A. D. 1913, by order of Praecipe filed by the Plaintiffs herein, Summons was issued for Stevirmac Oil & Gas Co., a corporation and Virgil Hicks, which said summons with the Marshal's Return thereon is in words and figures as follows:

Summons.

District Court, United States of America, Eastern District of Oklahoma, ... Division—ss.

The United States of America, To the Marshal of the Eastern District of Oklahoma, Greeting:

You are hereby commanded to notify Stevirmac Oil & Gas Co., a corp., Sapulpa, Okla., Virgil Hicks, Sapulpa, Oklahoma, that they have been sued by C. E. Dittman, L. H. Dittman, J. A. Dittman, and C. E. Dittman Oil & Gas Co., a corporation in the District Court of the United States for the Eastern District of Oklahoma, ... Division, and that unless they answer by the 3rd day of November, A. D. 1913, the petition of the said C. E. Dittman, *et al.*, against them filed in the clerk's office of the said Court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 14th day of October, A. D. 1913.

Witness, The Hon. Ralph E. Campbell, Judge of U. S. Dist. Court of the United States of America, at the City of Muskogee, in said District, this 4th day of October, A. D. 1913.

(Seal) R. P. Harrison, *Clerk.*

By L. S. Trimble, *Deputy.*

Suit brought for the recovery of money. Amount claimed $9,675.00 with interest from the 8th day of June, A. D. 1912, at the rate of .... per cent per annum and costs.

C. R. Thurlwell, and Wise & Minor,

Attorney for Plaintiff.

U. S. Marshal's Return (Original Return).

Eastern District of Oklahoma—ss.

Received the within writ Oct. the 11, 1913, and on the 13 day of Oct., 1913, I delivered a copy of the writ to Virgil Hicks, *Tres* in Person at Sapulpa, Okla.

The other defendant named herein was not served.

B. A. ENLOE, *U. S. Marshal,*
By HOLMES DAVIDSON, *Dep.*

Endorsed: Filed Oct. 15, 1913, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And thereafterwards, to-wit, on the 1st day of December, A. D. 1913, the same being one of the days of a Special Session of the United States District Court for the Eastern District of Oklahoma, held at Muskogee, Oklahoma, Court met pursuant to adjournment. Present and presiding the Honorable RALPH E. CAMPBELL, Judge.

Among the proceedings had on this day is the following:

In the District Court of the United States for the Eastern District of Oklahoma. C. E. Dittman, L. H. Dittman, and J. A. Dittman, citizens and residents of the State of Pennsylvania, and the C. E. Dittman Oil & Gas Company, a corporation, organized under the laws of the State of Delaware, and domiciled in and a resident of the State of Delaware, Plaintiffs, v. *The Stevirmac Oil & Gas Company, a corporation, organized under the laws and domiciled in the State of Oklahoma, Defendant.*—No. 2080.

Journal Entry for Default Judgment.

Now on this 1st day of December, 1913, being one of the regular judicial days of the special 1913 term of said court, sitting at Muskogee, Oklahoma, in said District this cause comes on to be heard in its regular order; and the plaintiffs appeared by C. R. Thurlwell, their attorney, and the defendant, The Stevirmac Oil & Gas Company having been three times called in open court to appear, except, demur, answer or plead to the petition of the plaintiff herein, comes not, but makes default. And the Court having ordered that said defendant is in default and having ordered that the allegations contained in plaintiff's petition be taken as confessed; and it appearing to the court that said defendant has been duly notified according to law of the pendency of this action; and the

court having heard all the evidence, and being fully advised in the premises, and on consideration thereof, finds that all the averments of plaintiffs' petition are true as therein set forth; that the said plaintiffs recovered a judgment in the District Court of the United States for the Western District of Pennsylvania in a cause therein pending against the defendant herein for the sum of $9,675.00 and $200.00 costs; that said judgment still remains in no wise reversed, annulled, satisfied or set aside; that said plaintiffs are entitled to a judgment against the defendant for the amount of their judgment recovered in the Western District of Pennsylvania and interest thereon, and costs therein and herein expended.

It is therefore ordered, adjudged and decreed by the court that the plaintiffs do have and recover of and from the defendant the sum of $9,675.00 and interest thereon from the 8th day of June, 1912, at six per cent, and $200.00 costs expended in the United States Court for the Western District of Pennsylvania, and their costs herein laid out and expended.

RALPH E. CAMPBELL,
Judge of the United States District Court for the Eastern District of Oklahoma.

And, to-wit, on the 25th day of November, A. D. 1913, the following proceedings were had in this cause, Honorable RALPH E. CAMPBELL, Judge presiding.

Order Directing Marshal to Amend Return.

Now on this 25th day of November, 1913, it is ordered that the United States Marshal for this District be required, and he is hereby directed, to amend the return upon the original process to conform with the facts.

And, thereafterwards, the United States Marshal in compliance with the order of the court, heretofore made on the 25th day of November, 1913, directing him to amend his return upon the original process to conform with the facts, amended his return to read as follows:

Marshal's Amended Return on Original Process.

United States of America, Eastern District of Oklahoma—ss.

I hereby certify and return that I served the annexed summons on the therein named The Stevirmac Oil & Gas Company by handing to and leaving a true and attested copy thereof with Virgil Hicks personally and as Treasurer of said Company personally at Sapulpa, Oklahoma, in said District on the 13th day of October, A. D. 1913, the President, Chairman of

the Board of Directors or other chief officer not found in my district. The said Virgil Hicks on whom service was made was the person in charge of the place of business of said corporation.

B. A. ENLOE, JR., *U. S. Marshal.*
By HOLMES DAVIDSON, *Deputy.*

And, to-wit, on the 18th day of May, A. D. 1915, the defendant The Stevirmac Oil & Gas Company filed Special Appearance and Motion to set aside the Judgment herein, together with notice and proof of service of Motion upon the opposing counsel. Said Motion is in words and figures as follows:

Notice to Counsel of Filing of Special Appearance and Motion to Set Aside Judgment.

To the Plaintiffs, and C. R. Thurlwell, Their Attorney:

Take notice that the Stevirmac Oil & Gas Company will, on the 18th day of May, 1915, file in the United States Court for the Eastern District of Oklahoma special appearance and motion to set aside judgment, a copy of which it attached hereto; and will ask the court to hear the same on the first Monday in June, 1915, or as soon thereafter as the business of the Court will permit.

RAMSEY & DE MEULES,
Attorneys for The Stevirmac Oil and Gas Company.

State of Oklahoma, County of Muskogee.

Sol H. Kaufman, being first duly sworn deposes and says that he registered at the United States Postoffice at Muskogee and deposited in the United States mail at said postoffice, for transmission in said mail, the notice a copy of which is above set out together with the copy of "special appearance and motion to set aside judgment" therein referred to (the original of which special appearance and motion is hereto attached), all contained in an envelope properly sealed and addressed, to C. R. Thurlwell, at Tulsa, Oklahoma; said registering being evidenced by receipt appearing on the reverse side hereof. SOL H. KAUFMAN,

Subscribed and sworn to before me this 18th day of May, 1915. (Seal) Ethel P. Kerr, Notary Public. My commission expires Oct. 1, 1916.

No. 9540. Postmark, Registered, Muskogee, Okla., May 17, 1915. Receipt for Registered Mail. This receipt repre-

sents a letter or parcel registered at the post office indicated by postmark. Inquiries concerning registered mail should state the number of the article, date of its registration, and the names and addresses of the sender and addressee. The sender of the article represented by this receipt should write the name and address of the addressee on the reverse side. Return receipt requested. 1 class postage prepaid. Postmaster, per R.

Post Office Department—Official Business. Penalty for private use to avoid payment of postage, $300. Postmark of Delivering Office (printed stamp: 2) (1915) and Date of Delivery. (Tulsa, May 18 4-PM Okla.) Original Reg. No., 9540. Return to: Sol H. Kuffman (Name of Sender.). Street and Number, or Post Office Box, ..., Muskogee, Oklahoma. This card must be neatly and correctly made up and addressed at the post office where the article is registered. The postmaster who delivers the registered article must see that this card is properly signed, legibly postmarked, and mailed to the sender, without envelope or postage. [over:] Registry Return Receipt. (Form 1548. Received from the postmaster registered article, the original number of which appears on the reverse side of this card. Date of delivery, May 18 1915 (To be filled in by person signing receipt.). When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt. C. R. Thurlwell (Signature or name of addressee.). ..... (Signature of addressee's agent.). A registered article must not be delivered to anyone but the addressee or the person in whose care it is addressed except upon addressee's written order from the sender transmitted by the mailing postmaster and duly verified. When the above receipt has been properly signed, it must be postmarked with the name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

Special Appearance and Motion to Set Aside Judgment.

Comes now The Stevirmac Oil & Gas Company, by its attorneys, Ramsey and de Meules, specially appearing, and appearing for the purposes of this motion only, and so appearing moves the court to set aside the purported judgment by default rendered herein on the first day of December, 1913; and for cause, The Stevirmac Oil & Gas Company, specially appearing as aforesaid, respectfully shows:

That the defendant, The Stevirmac Oil & Gas Company, is, and was at all the times mentioned herein, a corporation; that the summons issued herein, named as defendants in the body thereof both Virgil Hicks and The Stevirmac Oil & Gas

Company; that on the 13th day of October, 1913, Holmes Davidson, as Deputy United States Marshal, delivered to said Virgil Hicks at Sapulpa, Oklahoma, one copy (and only one copy) of said summons; that at that time H. H. McFann was President of the defendant corporation, and was in the town of Sapulpa, and could have been found by the use of reasonable diligence; that said McFann, during all the year 1913, was a resident of the town of Sapulpa, and was well known in said town, and had a regular place of business and a regular residence in said town; that on October 13, 1913, said McFann was, on the morning and in the evening of said day, at his said place of residence in said town, and during the business hours of said day was at his said place of business in said town; that the said Hicks was not in charge of the place of business of the defendant corporation; that at the time of the delivery of said copy of summons to said Hicks, said Davidson did not tell or inform said Hicks in any way that said copy was for defendant, The Stevirmac Oil & Gas Company, or that said delivery to said Hicks was intended as a service upon said defendant corporation, but said Hicks, being himself named as a defendant in said summons, understood and believed that it was intended as a service upon him individually and not otherwise; that at the time of such delivery of said copy of summons to the said Hicks, the said Davidson inquired of said Hicks what was the name of the President of the defendant corporation, and where he could be found, and said Hicks then and there told said Davidson in response to said inquiry that H. H. McFann was President of defendant corporation, that the said McFann was then in Sapulpa, and also told him where said McFann would be found; that the above and foregoing was all the service of summons that was made in this case; that no summons in this case was ever served on said McFann, and no service of summons has ever been made in this case on The Stevirmac Oil & Gas Company.

That on the 15th day of October, 1913, the United States Marshal for the Eastern District of Oklahoma, returned into and filed in the office of the Clerk of this Court the original summons issued herein with his return thereon, which reads as follows, to-wit:

U. S. Marshal's Return.

Eastern District of Oklahoma—ss.

Received the within writ Oct. the 11, 1913, and on the 13 day of Oct. 1913, I delivered a copy of this writ to Virgil Hicks, Tres in person at Sapulpa, Okla. The other defendant named herein was not served.

B. A. Enloe, *U. S. Marshal,*
By Holmes Davidson, *Dep.*

That thereafter, to-wit, on the 25th day of November, 1913, without any notice to your movant, this court made an order requiring and directing said Marshal "to amend the return upon the original process to conform with the facts."

That thereafter (the date thereof being unknown to your movant), without notice to your movant, the said Marshal made a so-called amended return, reading as follows, to-wit:

RETURN OF SERVICE OF WRIT.

United States of America, Eastern District of Oklahoma—ss.

I hereby certify and return that I served the annexed summons on the therein named The Stevirmac Oil & Gas Company by handing to and leaving a true and attested copy thereof with Virgil Hicks personally, Treasurer of said Company, personally at Sapulpa, Oklahoma, in said District, on the 13th day of October, A. D. 1913, the President, Chairman of the Board of Directors or other chief officer not found in my district.

The said Virgil Hicks on whom service was made was the person in charge of the place of business of said corporation.

B. A. ENLOE, *U. S. Marshal,*
By HOLMES DAVIDSON, *Deputy.*

That said amended return was and is, as above shown, false, in that (1) said Davidson, as Deputy United States Marshal, in delivering said copy of summons to said Hicks, did not intend and make the same as a service upon the defendant corporation; (2) the President of the defendant corporation was then in the Eastern District of Oklahoma and in the town of Sapulpa, Oklahoma, and could have been found by the use of reasonable diligence, all of which was then and there known to the said Davidson; (3) the said Virgil Hicks was not in charge of the place of business of defendant corporation; and (4) that the said Davidson did not at any time serve said summons on the Stevirmac Oil & Gas Company. That plaintiffs caused and procured said false amended return to be made by the said Davidson.

That your movant had no notice or knowledge of said order of the court of said amended return until long after the judgment in this case was rendered, and therefore had no opportunity to show the truth of the facts now asserted by it, and the falsity of the statements contained in the amended return, and especially this defendant had no opportunity of having a hearing before said amended return was made, and no notice that such amended return was to be made.

Defendant further shows that the records of this case fail to show that the Marshal asked leave of the court or that the

court granted leave to make such amended return as was made, and defendant therefore avers that no such leave was prayed and granted. It is true that the court ordered the Marshal to amend his original return, but said return was complete upon its face, to show service upon Virgil Hicks, and that the defendant, The Stevirmac Oil & Gas Company, was not served, and that therefore this court had no power to require the Marshal to make another or different return.

That, therefore, said judgment was irregularly obtained, without service of process upon defendant as required by law, and is void.

And in support of the foregoing, certain affidavits are attached hereto and made a part hereof, and the said The Stevirmac Oil & Gas Company offers to introduce further testimony either oral or in the form of affidavits, as the Court shall direct.

RAMSEY & DE MEULES,
Attorneys for the Stevirmac Oil & Gas Co.

In the District Court of the United States for the Eastern District of Oklahoma. C. E. Dittman, et al., Plaintiffs, v. *The Stevirmac Oil & Gas Company, et al., Defendants.—No. 2080.*

AFFIDAVIT.

State of Oklahoma, County of Creek—ss.

H. H. McFann of Tulsa, Oklahoma, being by me first duly sworn according to law, states upon his oath that at the first meeting of the board of directors of The Stevirmac Oil & Gas Company, he was elected its President and has continued as such, and was President of said company on the 13th day of October, 1913.

That during the latter part of the year 1913, Virgil Hicks of Sapulpa, Oklahoma, asked affiant whether or not Holmes Davidson, a Deputy United States Marshall, had served affiant with a summons in the case of *C. E. Dittman et al. versus The Stevirmac Oil & Gas Company*, pending in the United States District Court for the Eastern District of Oklahoma, and that the said Hicks told affiant that the said Davidson had served said Hicks with a summons in said case either on that date or the date previous, and that in said conversation the said Hicks told affiant that he (Hicks) had told Davidson that affiant was the President of The Stevirmac Oil & Gas Company and was then in Sapulpa, and where affiant could be found on the date that service was made on said Hicks.

Affiant does not now recall whether Hicks said that service had been made upon him (Hicks) on the date of the conversation in question or on the date previous thereto, but affiant does know and states that he was in Sapulpa, Oklahoma, on both of said dates at his usual place of business, and could have been found by the use of ordinary diligence.

Affiant further states that during all the year 1913, he was a resident of the City of Sapulpa, Oklahoma.

Affiant further states that he had no notice or knowledge of the order of court made in this case on the 25th day of November, 1913, or of the amended return made by the Marshall, or of the judgment by default rendered herein, until long after said judgment was rendered.

H. H. McFANN.

Subscribed and sworn to before me this 13th day of May, 1915. (Seal) Nellie C. Cox, Notary Public. My commission expires—My Commission Expires Mar. 11, 1917.

In the District Court of the United States for the Eastern District of Oklahoma. C. E. Dittman, et al., Plaintiffs, v. *The Stevirmac Oil & Gas Company, et al., Defendants.—No. 2080.*

AFFIDAVIT.

State of Oklahoma, County of Creek—ss.

Virgil Hicks of Sapulpa, Oklahoma, being by me first duly sworn according to law, states upon his oath that on the 13th day of October, 1913, Holmes Davidson, a Deputy United States Marshal, served a summons upon him, issued in the above entitled cause, by delivering to him a copy thereof at his office in the City of Sapulpa, State of Oklahoma.

That only one copy of said summons was delivered to him, and that said Davidson did not tell, or in any way inform this affiant that said copy of said summons was intended for any one else but affiant individually, and did not tell or in any way inform affiant that said copy of summons was intended for The Stevirmac Oil & Gas Company, or intended as a service upon The Stevirmac Oil & Gas Company; that said Davidson had two summonses in his possession at the time, one for this affiant and the other for the Stevirmac Oil & Gas Company, and after serving this affiant, inquired where and how he (Davidson) could make service upon The Stevirmac Oil & Gas Company, and in response to said inquiry affiant told said Davidson that H. H. McFann was President of The Stevirmac Oil & Gas Company, and was then in Sapulpa, and affiant told

said Davidson how and where McFann could be found; that said H. H. McFann was, on the 13th day of October, 1913, the President of The Stevirmac Oil & Gas Company, and was, on said date, in the City of Sapulpa, State of Oklahoma, and could have been found by the said Davidson by the use of ordinary diligence; that at the time said copy of summons was delivered to this affiant as aforesaid, affiant was not in charge of the place of business of The Stevirmac Oil & Gas Company.

VIRGIL HICKS,

Subscribed and sworn to before me this 12 day of May, 1915. (Seal) Elva L. Tate, Notary Public. My commission expires 2-17-19.

Endorsed: Filed May 18, 1915, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 27th day of December, A. D. 1915, the following proceedings were had in this cause. Honorable RALPH E. CAMPBELL, Judge presiding.

Order Overruling Motion to Set Aside Judgment.

Now on this 27th day of December, A. D. 1915, came on to be heard the motion or application of The Stevirmac Oil and Gas Company to set aside the judgment heretofore rendered in this cause against it on the 1st day of December, 1913, and the Court having considered said motion or application and having heard the argument of counsel thereon, and now being duly advised in the premises, doth consider and adjudge that said motion or application, and the affidavits introduced by said The Stevirmac Oil and Gas Company in support thereof, do not state facts sufficient to entitle said The Stevirmac Oil and Gas Company to set aside the aforesaid judgment, and that, therefore, the Court should not hear any evidence *de hors* the record for or against said motion or application.

It is therefore, ordered, considered and adjudged that the said motion or application of The Stevirmac Oil and Gas Company be and the same is hereby overruled; to which ruling and decision of the Court The Stevirmac Oil and Gas Company does duly except.

It is further ordered that The Stevirmac Oil and Gas Company have thirty (30) days from this date in which to prepare and serve a bill of exceptions, five days for suggestions of amendments, to be thereafter settled upon 3 days' notice.

RALPH E. CAMPBELL,

And, to-wit, on the 27th day of December, A. D. 1915, the following Certificate was made and entered in this cause.

Certificate.

In this cause I hereby certify that the order made this day refusing to set aside and vacate the judgment rendered herein on the 1st day of December, 1913, involves and determines the question whether this court had jurisdiction over the person of the Stevirmac Oil & Gas Company against whom said judgment was rendered, it being the contention of said The Stevirmac Oil & Gas Company that this Court had not jurisdiction to render said judgment on account of lack of jurisdiction of the person; that the order this day entered is a denial of such contention.

This certificate is made conformably to section 238 of the Judicial Code, approved March 3, 1911.

Done this 27th day of December, A. D. 1915.

RALPH E. CAMPBELL,
District Judge for the Eastern District of Oklahoma.

And, to-wit, on the 24th day of January, A. D. 1916, the defendant The Stevirmac Oil and Gas Company, filed its Bill of Exceptions herein, which is in words and figures as follows:

Bill of Exceptions.

Be It Remembered, That on the 18th day of May, 1915, The Stevirmac Oil and Gas Company filed in the District Court of the United States for the Eastern District of Oklahoma its special appearance and motion to set aside the default judgment rendered in the above entitled cause on the 1st day of December, 1913, against said The Stevirmac Oil & Gas Company; which special appearance and motion is in words and figures following, to-wit:

In the District Court of the United States for the Eastern District of Oklahoma. C. E. Dittman, et al., Plaintiffs, v. *The Stevirmac Oil & Gas Company, et al., Defendants.*— No. 2080.

SPECIAL APPEARANCE AND MOTION TO SET ASIDE JUDGMENT.

Comes now The Stevirmac Oil & Gas Company, by its attorneys, Ramsey and de Meules, specially appearing, and appearing for the purpose of this motion only, and so appearing moves the court to set aside the purported judgment by

default rendered herein on the first day of December, 1913; and for cause, The Stevirmac Oil & Gas Company, specially appearing as aforesaid, respectfully shows:

That the defendant, The Stevirmac Oil & Gas Company, is, and was at all the times mentioned herein, a corporation; that the summons issued herein, named as defendants in the body thereof both Virgil Hicks and The Stevirmac Oil & Gas Company; that on the 13th day of October, 1913, Holmes Davidson, as Deputy United States Marshal, delivered to said Virgil Hicks at Sapulpa, Oklahoma, one copy (and only one copy) of said summons; that at that time H. H. McFann was president of the defendant corporation, and was in the town of Sapulpa, and could have been found by the use of reasonable diligence; that said McFann, during all the year 1913, was a resident of the town of Sapulpa, and was well known in said town, and had a regular place of business and a regular residence in said town; that on October 13th, 1913, said McFann was on the morning and in the evening of the said day, at his said place of residence in said town, and during the business hours of said day was at his said place of business in said town; that the said Hicks was not in charge of the place of business of the defendant corporation; that at the time of the delivery of said copy of summons to said Hicks, said Davidson did not tell or inform said Hicks in any way that said copy was for defendant, The Stevirmac Oil & Gas Company, or that said delivery to said Hicks was intended as a service upon said defendant corporation, but said Hicks, being himself named as a defendant in said summons, understood and believed that it was intended as a service upon him individually and not otherwise; that at the time of such delivery of said copy of summons to the said Hicks, the said Davidson inquired of said Hicks what was the name of the President of the defendant corporation, and where he could be found, and said Hicks then and there told said Davidson in response to said inquiry that H. H. McFann was President of defendant Corporation, that the said McFann was then in Sapulpa, and also told him where said McFann would be found; that the above and foregoing was all the service of summons that was made in this case; that no summons in this case was ever served on said McFann, and no service of summons has ever been made in this case on The Stevirmac Oil & Gas Company.

That on the 15th day of October, 1913, the United States Marshal for the Eastern District of Oklahoma, returned into and filed in the office of the clerk of this Court the original summons issued herein with his return thereon, which reads as follows, to-wit:

U. S. Marshal's Return.

Eastern District of Oklahoma—*ss.*

Received the within writ Oct. the 11, 1913, and on the 13 day of Oct. 1913, I delivered a copy of this writ to Virgil Hicks, Tres in person at Sapulpa, Okla. The other defendant named herein was not served.

B. A. Enloe, U. S. Marshal,
By Holmes Davidson, Dep.

That thereafter, to-wit, on the 25th day of November, 1913, without any notice to your movant, this court made an order requiring and directing said Marshal "to amend the return upon the original process to conform with the facts."

That thereafter (the date thereof being unknown to your movant), without notice to your movant, the said Marshal made a so-called amended return, reading as follows, to-wit:

Return of Service of Writ.

United States of America, Eastern District of Oklahoma—*ss.*

I hereby certify and return that I served the annexed summons on the therein named The Stevirmac Oil & Gas Company by handing to and leaving a true and attested copy thereof with Virgil Hicks personally, Treasurer of said Company, personally at Sapulpa, Oklahoma, in said District, on the 13th day of October, A. D. 1913, the President, Chairman of the Board of Directors or other chief officer not found in my district.

The said Virgil Hicks on whom service was made was the person in charge of the place of business of said corporation.

B. A. Enloe, U. S. Marshal,
By Holmes Davidson, Deputy.

That said amended return was and is, as above shown, false, in that (1) said Davidson, as Deputy United States Marshal, in delivering said copy of summons to said Hicks, did not intend and make the same as a service upon the defendant corporation; (2) the President of the defendant corporation was then in the Eastern District of Oklahoma and in the town of Sapulpa, Oklahoma, and could have been found by the use of reasonable diligence, all of which was then and there known to the said Davidson; (3) the said Virgil Hicks was not in charge of the place of business of defendant corporation; and (4) that the said Davidson did not at any time serve said summons on the Stevirmac Oil & Gas Company.

That plaintiff caused and procured said false amended return to be made by the said Davidson.

That your movant had no notice or knowledge of said order of the court or of said amended return until long after the judgment in this case was rendered, and therefore had no opportunity to show the truth of the facts now asserted by it, and the falsity of the statements contained in the amended return, and especially this defendant had no opportunity of having a hearing before said amended return was made, and no notice that such amended return was to be made.

Defendant further shows that the records of this case fail to show that the Marshal asked leave of the court or that the court granted leave to make such amended return as was made, and defendant therefore avers that no such leave was prayed and granted. It is true that the Court ordered the Marshal to amend his original return, but said return was complete upon its face, to show service upon Virgil Hicks, and that the defendant, The Stevirmac Oil & Gas Company, was not served, and that therefore this court had no power to require the Marshal to make another or different return.

That, therefore, said judgment was irregularly obtained, without service of process upon defendant as required by law, and is void.

And in support of the foregoing, certain affidavits are attached hereto and made a part hereof, and the said The Stevirmac Oil & Gas Company offers to introduce further testimony either oral or in the form of affidavits, as the Court shall direct.

RAMSEY & DE MEULES,

Attorneys for The Stevirmac Oil & Gas Co.

That at the same time and on the said 18th day of May, 1915, The Stevirmac Oil & Gas Company filed in said Court in support of the foregoing motion, and attached thereto, the two several affidavits of H. H. McFann and Virgil Hicks; which affidavits are, respectively, in words and figures following:

In the District Court of the United States for the Eastern District of Oklahoma. C. E. Dittman, et al., Plaintiffs, v. *The Stevirmac Oil & Gas Company, et al., Defendants.* —No. 2080.

AFFIDAVIT.

State of Oklahoma, County of Creek—ss.

H. H. McFann, of Tulsa, Oklahoma, being by me first duly sworn according to law, states upon his oath that at the first

meeting of the board of directors of The Stevirmac Oil & Gas Company, he was elected its President and has continued as such, and was President of said company on the 13th day of October, 1913.

That during the letter part of the year 1913, Virgil Hicks of Sapulpa, Oklahoma, asked affiant whether or not Holmes Davidson, a Deputy United States Marshal, had served affiant with a summons in the case of *C. E. Dittman et al. versus The Stevirmac Oil & Gas Company*, pending in the United States District Court for the Eastern District of Oklahoma, and that the said Hicks told affiant that the said Davidson had served said Hicks with a summons in said case either on that date or the date previous, and that in said conversation the said Hicks told affiant that he (Hicks) had told Davidson that affiant was the President of The Stevirmac Oil & Gas Company and was then in Sapulpa, and where affiant could be found on the date that service was made on said Hicks.

Affiant does not now recall whether Hicks said that service had been made upon him (Hicks) on the date of the conversation in question or on the date previous thereto, but affiant does know and states that he was in Sapulpa, Oklahoma, on both of said dates at his usual place of business, and could have been found by the use of ordinary diligence.

Affiant further states that during all the year 1913, he was a resident of the City of Sapulpa, Oklahoma.

Affiant further states that he had no notice or knowledge of the order of court made in this case on the 25th day of November, 1913, or of the amended return made by the Marshal, or of the judgment by default rendered therein, until long after said judgment was rendered.

H. H. McFann.

Subscribed and sworn to before me this 13th day of May, 1915. (Seal) Nellie C. Cox, Notary Public. My commission expires Mar. 11, 1917.

In the District Court of the United States for the Eastern District of Oklahoma. C. E. Dittman, et al., Plaintiffs, v. *The Stevirmac Oil & Gas Company, et al., Defendants.* —No. 2080.

Affidavit.

State of Oklahoma, County of Creek—ss.

Virgil Hicks, of Sapulpa, Oklahoma, being by me first duly sworn according to law, states upon his oath that on the 13th day of October, 1913, Holmes Davidson, a Deputy United States Marshal, served a summons upon him, issued in the

above entitled cause, by delivering to him a copy thereof at his office in the City of Sapulpa, State of Oklahoma.

That only one copy of said summons was delivered to him, and that said Davidson did not tell, or in any way inform this affiant that said copy of said summons was intended for any one else but affiant individually, and did not tell or in any way inform affiant that said copy of summons was intended for The Stevirmac Oil & Gas Company, or intended as a service upon The Stevirmac Oil & Gas Company; that said Davidson had two summonses in his possession at the time, one for this affiant and the other for The Stevirmac Oil & Gas Company, and after serving this affiant, inquired where and how he (Davidson) could made service upon The Stevirmac Oil & Gas Company, and in response to said inquiry, affiant told said Davidson that H. H. McFann was President of The Stevirmac Oil & Gas Company, and was then in Sapulpa, and affiant told said Davidson how and where McFann could be found; that said H. H. McFann was, on the 13th day of October, 1913, the President of the Stevirmac Oil and Gas Company, and was, on said date, in the City of Sapulpa, State of Oklahoma, and could have been found by the said Davidson by the use of ordinary diligence; that at the time said copy of summons was delivered to this affiant as aforesaid, affiant was not in charge of the place of business of The Stevirmac Oil & Gas Company.

VIRGIL HICKS.

Subscribed and sworn to before me this 12 day of May, 1915. (Seal) Elva L. Tate, Notary Public. My commission expires 2-17-19.

That at the same time and on the said 18th day of May, 1915, The Stevirmac Oil & Gas Company filed in said Court a copy of the notice directed to the plaintiffs concerning the filing of said motion, together with the affidavit of Sol H. Kauffman, with reference to the mailing of said notice; which said notice and affidavit are, respectively, in words and figures following, to-wit:

In the District Court of the United States for the Eastern District of Oklahoma. C. E. Dittman, et al., Plaintiffs, v. *The Stevirmac Oil & Gas Company, et al., Defendants.*—No. 2080.

NOTICE.

To the Plaintiffs, and C. R. Thurlwell, Their Attorney:

Take notice that The Stevirmac Oil & Gas Company will, on the 18th day of May, 1915, file in the United States Court for the Eastern District of Oklahoma special appearance and motion to set aside judgment, a copy of which is attached

hereto; and will ask the Court to hear the same on the first Monday in June, 1915, or as soon thereafter as the business of the Court will permit.

RAMSEY & DE MEULES,
Attorneys for The Stevirmac Oil & Gas Company.

State of Oklahoma, County of Muskogee—ss.

Sol H. Kaufman, being first duly sworn, deposes and says that he registered at the United States Post-office at Muskogee and deposited in the United States mail at said Post-office, for transmission in said mail, the notice a copy of which is above set out, together with the copy of "special appearance and motion to set aside judgment" therein referred to (the original of which special apeparance and motion is hereto attached), all contained in an envelope properly sealed and addressed, to C. R. Thurlwell, at Tulsa, Oklahoma; said registering being evidenced by receipt appearing on the reverse side hereof.

SOL H. KAUFMAN.

Subscribed and sworn to before me this 18th day of May, 1915. (Seal) Ethel P. Kerr, Notary Public. My commission expires Oct. 1, 1916.

On the reverse side of the sheet so filed containing said notice and affidavit is affixed a registry receipt slip, issued by the United States Post-office at Muskogee, Oklahoma, on the 18th day of May, 1915, and attached hereto is a registry return receipt signed by C. R. Thurlwell acknowledging receipt of the mail matter so registered.

That thereafter, to-wit, on the 7th day of June, 1915, said matter came on for hearing in said District Court upon said motion and affidavits hereinbefore set out, The Stevirmac Oil & Gas Company being represented by its attorneys, Ramsey & de Meules and Sol H. Kauffman, and the plaintiffs by their attorney, C. R. Thurlwell; the plaintiffs objected to the granting of said motion and contended that said motion and affidavits did not state facts sufficient to entitle the applicant to the relief prayed for; and the Court having heard the argument of counsel thereupon, took the matter under advisement for further consideration.

And on the 27th day of December, 1915, the Court, having taken time to consider the matter, announced its decision, due notice thereof having been given to counsel for the parties.

And being duly advised in the premises the said District Court of the United States for the Eastern District of Okla-

homa, on the 27th day of December, 1915, overruled and denied said motion of The Stevirmac Oil & Gas Company and refused to set aside the default judgment rendered against said Company on the 1st day of December, 1913, and said Court entered its order herein accordingly; to which decision and order The Stevirmac Oil & Gas Company prayed and was granted an exception.

And thereupon, for good cause shown, The Stevirmac Oil & Gas Company was by the Court granted thirty (30) days in which to prepare and serve a bill of exceptions, the plaintiffs five (5) days in which to suggest amendments, the bill of exceptions to be thereafter settled upon three (3) days' notice.

That journal entry of said order overruling said motion and refusing to set aside said default judgment and granting time for bill of exceptions is as follows:

In the United States District Court in and for the Eastern District of Oklahoma. C. E. Dittman, et al., Plaintiffs, v. *The Stevirmac Oil and Gas Company, et al., Defendants.* —No. 2080.

Now on this 27th day of December, A. D. 1915, came on to be heard the motion or application of The Stevirmac Oil and Gas Company to set aside the judgment heretofore rendered in this cause against it on the 1st day of December, 1913, And the Court having considered said motion or application and having heard the argument of counsel thereon, and now being duly advised in the premises, doth consider and adjudge that said motion or application, and the affidavits introduced by said The Stevirmac Oil Company in support thereof, do not state facts sufficient to entitle said The Stevirmac Oil and Gas Company to set aside the aforesaid judgment, and that, therefore, the Court should not hear any evidence *de hors* the record for or against said motion or application.

It is therefore ordered, considered and adjudged that the said motion or application of the Stevirmac Oil & Gas Company be and the same is hereby overruled; to which ruling and decision of the Court The Stevirmac Oil and Gas Company does duly except.

It is further ordered that The Stevirmac Oil and Gas Company have thirty (30) days from this date in which to prepare and serve a bill of exceptions; five days for suggested amendments, to be thereafter settled upon 3 days' notice.

RALPH E. CAMPBELL, *Judge.*

And now, in furtherance of justice, and that right may be done, The Stevirmac Oil & Gas Company presents the foregoing as its bill of exceptions in this case, and prays that the same may be settled and allowed, and signed and certified by the Judge as provided by law.

RAMSEY, DE MEULES & ROSSER,
Attorneys for The Stevirmac Oil & Gas Company.

In the District Court of the United States for the Eastern District of Oklahoma. C. E. Dittman, et al., Plaintiffs, v. *The Stevirmac Oil & Gas Company, et al., Defendants.*—No. 2080.

NOTICE.

To the Plaintiffs and C. R. Thurlwell, Their Attorney of Record:

The Stevirmac Oil & Gas Company hereby tenders and serves upon you its bill of exceptions in the above cause.

RAMSEY, DE MEULES & ROSSER,
Attorneys for The Stevirmac Oil & Gas Company.

I acknowledge service upon me of the within bill of exceptions this 14th day of January, 1916. C. R. THURLWELL,
Attorney for Plaintiffs.

In the District Court of the United States for the Eastern District of Oklahoma. C. E. Dittman, et al., Plaintiffs, v. *The Stevirmac Oil & Gas Company, et al., Defendants.*—No. 2080.

The plaintiffs agree that the bill of exceptions annexed hereto may be signed, settled and allowed by the Court at any time it may suit the convenience of the Court, without notice to the plaintiffs. The plaintiffs have no amendments to suggest. C. R. THURLWELL,
Attorney for Plaintiffs.

In the District Court of the United States for the Eastern District of Oklahoma. C. E. Dittman, et al., Plaintiffs, v. *The Stevirmac Oil & Gas Company, et al., Defendants.*—No. 2080.

ORDER SETTLING BILL OF EXCEPTIONS.

Now on this day the foregoing bill of exceptions is presented for signing and settling; and it being found that the same has been duly served upon the plaintiffs, and that the plaintiffs have suggested no amendments and have stipulated

that said bill of exceptions may be signed and settled without further notice to them, at any time it may suit the convenience of the court.

And the Court having examined said bill of exceptions, finds that the same is correct, and the same is, therefore, hereby, approved, allowed and settled, and made a part of the record herein.

Done in open court this 24th day of January, 1916.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed In Open Court, Jan. 24, 1916, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 7th day of February, A. D. 1916, the defendant The Stevirmac Oil and Gas Company, filed Petition for Allowance of Writ of Error, together with its Assignment of Errors, which Petition was allowed by the Court. Said Petition for Allowance of Writ of Error, Assignment of Errors and Order Allowing Writ of Error are in words and figures:

Petition for Writ of Error.

And now comes The Stevirmac Oil & Gas Company and says:

That on or about the 1st day of December, 1913, the District Court of the United States for the Eastern District of Oklahoma entered its judgment herein in favor of the plaintiffs and against the said The Stevirmac Oil & Gas Company, and on the 27th day of December, 1915, said District Court entered its final order herein refusing to vacate and set aside said judgment, in which judgment and final order and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of said The Stevirmac Oil & Gas Company, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, The Stevirmac Oil & Gas Company prays that a writ of error may issue in this behalf out of the Supreme Court for the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

RAMSEY, DE MEULES & ROSSER,

Attorneys for The Stevirmac Oil & Gas Company.

Endorsed: Filed Feb. 7, 1916, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

Assignment of Errors.

The Stevirmac Oil & Gas Company, defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors, which it avers to exist:

First: The Court erred in making and entering, without notice to this defendant, its order requiring the United States Marshal to amend his original return of service on the process issued herein for the defendants.

Second: The Court erred in permitting the said Marshal without notice to this defendant, to amend his said original return of service and to file an amended return of service in lieu thereof.

Third: The Court erred in rendering and entering judgment by default in favor of the plaintiffs and against this defendant without service of process on this defendant.

Fourth: The Court erred in refusing to permit this defendant to show that no service of process had been had upon it in this cause.

Fifth: The Court erred in refusing to set aside and vacate the default judgment rendered herein on December 1, 1913.

Sixth: The Court erred in overruling and denying this defendant's application to set aside said judgment.

Seventh: The court erred in permitting the United States Marshal to make and file in this cause as a purported amended return, after the expiration of the return day, a return contradictory to and not amendatory of his original return.

Wherefore, this defendant prays that said judgment and the order refusing to set the same aside may be reversed.

RAMSEY, DE MEULES & ROSSER,
Attorneys for The Stevirmac Oil & Gas Company.

Endorsed: Filed Feb. 7, 1916, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

Order Allowing Writ of Error and Fixing Supersedeas Bond.

On this, the 7th day of February, A. D. 1916, the defendant, The Stevirmac Oil & Gas Company, comes and presents its petition for writ of error; on consideration whereof the Court does allow the writ of error. And said defendant may have supersedeas upon giving bond in the sum of Fifteen Thousand ($15,000.00) Dollars.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Feb. 7, 1916, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

Writ of Error.

The United States of America—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Eastern District of Oklahoma, Greeting:

Because in the records and proceedings, and also in the rendition of a judgment of a plea which is in the said District Court, before you, between C. E. Dittman, L. H. Dittman, J. A. Dittman, and the C. E. Dittman Oil & Gas Company, a corporation, plaintiffs, and The Stevirmac Oil & Gas Company, defendant, a manifest error has happened, to the great damage of said The Stevirmac Oil & Gas Company, as by its complaint appears: We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington, on the 29th day of March, next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 28th day of February, in the year of our Lord one thousand nine hundred and sixteen.

R. P. HARRISON,
Clerk of the District Court of the United States for the Eastern District of Oklahoma.
(Seal) By H. E. BOUDINOT, *Deputy.*

Allowed by RALPH E. CAMPBELL, *District Judge.*

RETURN TO WRIT.

United States of America, East[illegible] District of Oklahoma—ss.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the United States District Court for the Eastern District of Oklahoma.

R. P. HARRISON,
Clerk of the United States District Court;
(Seal) By H. E. BOUDINOT, *Deputy.*

Endorsed: Filed Feb. 28, 1916, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

Citation.

The United States of America—ss.

To C. E. Dittman, L. H. Dittman and J. A. Dittman, and the C. E. Dittman Oil & Gas Company, a corporation:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, on the 29th day of March, next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Oklahoma, wherein the Stevirmac Oil & Gas Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and final order rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the City of Muskogee, in the district above mentioned, this 28th day of February, in the year of our Lord one thousand nine hundred and sixteen.

RALPH E. CAMPBELL,
Judge of the District Court of the United States for the Eastern District of Oklahoma.

Service of the above citation this 29th day of February, 1916, is hereby acknowledged. C. R. THURLWELL,
Attorney for C. E. Dittman et al., Plaintiffs.

Notice.

To C. E. Dittman, L. H. Dittman and J. A. Dittman, and the C. E. Dittman Oil & Gas Company, a corporation:

You will take notice that the Stevirmac Oil & Gas Company, one of the defendants in the above entitled cause, hereby elects to file in the appellate court a printed transcript of the record in said cause. You are also notified that said, The Stevirmac Oil & Gas Company will include in said printed transcript the following parts of the record in the above entitled cause, to-wit:

1. Petition of plaintiffs;
2. Original process with original return of service by the Marshal thereon;
3. Amended return of service by the Marshal on said process;
4. Special appearance and motion of The Stevirmac Oil & Gas Company to set aside judgment, together with the affidavits of H. H. McFann and Virgil Hicks, and together with notice of filing the same directed to the plaintiffs and their counsel;
5. Certificate of jurisdictional question;
6. Order requiring Marshal to amend return of service;
7. Judgment for plaintiffs of December 1, 1913;
8. Order overruling motion to set aside judgment;
9. Bill of exceptions;
10. Petition for writ of error;
11. Assignment of errors;
12. Order allowing writ of error;
13. Writ of error and return;
14. Citation and acceptance of service;
15. Notice concerning printed transcript;
16. Certificate of Clerk.

RAMSEY, DE MEULES & ROSSER,
Attorneys for Defendant, The Stevirmac Oil & Gas Company.

Service of the above notice is hereby acknowledged.
C. R. THURLWELL, *Attorneys for Plaintiffs.*

Endorsed: Filed Mar. 3, 1916, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

Certificate of Clerk.

United States of America, Eastern District of Oklahoma—ss.

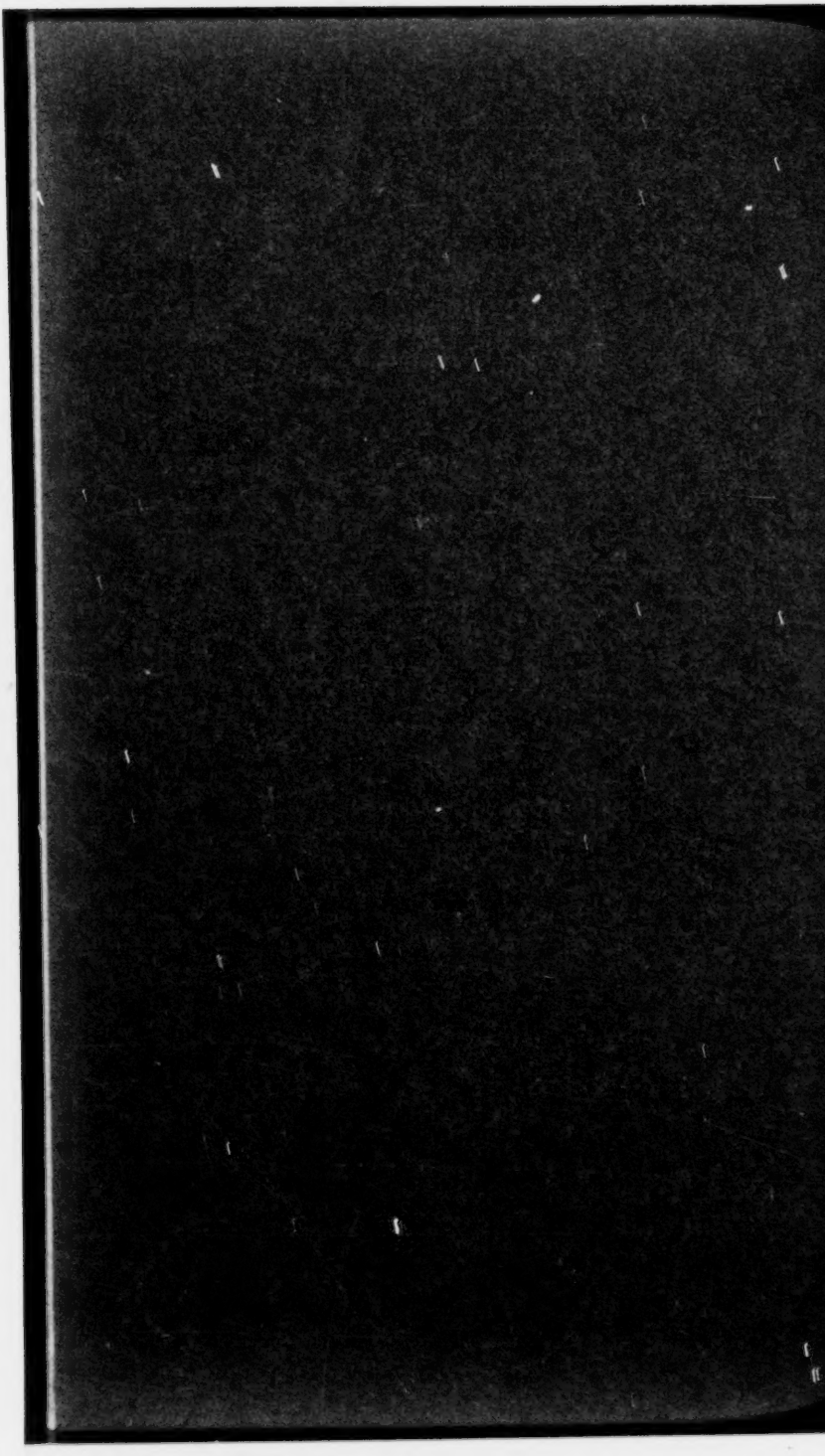
I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of *C. E. Dittman et al.* v. *The Stevirmac Oil and Gas Company et al.*, No. 2080, as was ordered by praecipe of counsel to be prepared and authenticated, as the same appears from the records in my office.

I do further certify that the Writ of Error and Citation attached hereto, and returned herewith, are the original Writ of Error and Citation issued in this cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court at my office in the City of Muskogee, Oklahoma, this 22nd day of March, 1916.

R. P. HARRISON, *Clerk*,

(Seal) By H. E. BOUDINOT, *Deputy*.



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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 425.

THE STEVIRMAC OIL & GAS COMPANY, a Corporation, - - - - - - - - - ***Plaintiff in Error,***

vs.

C. E. DITTMAN, L. H. DITTMAN, J. A. DITTMAN, and C. E. DITTMAN OIL AND GAS COMPANY, a Corporation, - - - - - ***Defendants in Error.***

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

BRIEF *of* PLAINTIFF *in* ERROR.

Statement of the Case.

On October 4, 1913, defendants in error (whom we shall hereinafter style plaintiffs), brought, in the United States District Court for the Eastern District of Oklahoma, an action at law against The Stevirmac Oil & Gas Company, plaintiff in error herein, and Virgil Hicks, to recover a money judgment.

And on the same day plaintiffs caused original process to be issued, which is as follows (Rec., p. 25):

"*District Court, United States of America, Eastern District of Oklahoma, ... Division*--ss.

"The United States of America, To the Marshal of the Eastern District of Oklahoma, Greeting:

" You are hereby commanded to notify The Stevirmac Oil & Gas Company, a corp., Sapulpa, Okla., Virgil Hicks, Sapulpa, Oklahoma, that they have been sued by C. E. Dittman, H. L. Dittman, and C. E. Dittman Oil & Gas Company, a corporation, in the District Court of the United States for the Eastern District of Oklahoma, ... Division, and that unless they answer by the 3rd day of November, A. D. 1913, the petition of said C. E. Dittman *et al.*, against them filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 14th day of October, A. D. 1913.

" *Witness*, The Hon. RALPH E. CAMPBELL, Judge of U. S. Dist. Court of the United States of America, at the City of Muskogee, in said District this 4th day of October, A. D. 1913.

(Seal) R. P. HARRISON, *Clerk*,

By L. S. TRIMBLE, *Deputy*."

On October 15, 1913, the marshal returned into court said original process with his return thereon, as follows (Rec., p. 26):

" Received the within writ Oct. the 11th, 1913, and on the 13th day of October, 1913, I delivered a copy of this writ to Virgil Hicks, Tres in person at Sapulpa, Okla.

" The other defendant named herein was not served."

On November 25, 1913, the court made the following order (Rec., p. 27):

" Now on this 25th day of November, A. D. 1913, it is ordered that the United States marshal for this district be required, and he is hereby directed, to amend the return upon the original process to conform with the facts."

On November 25, 1913, in accordance with said order, the marshal amended his return to read as follows (Rec., p. 27):

" I hereby certify and return that I served the annexed summons on the therein named The Stevirmac Oil & Gas Company by handing to and leaving a true and attested copy thereof with Virgil Hicks personally and as treasurer of said company personally at Sapulpa, Oklahoma, in said district on the 13th day of October, A. D. 1913, the president, chairman of the board of directors, or other chief officer not found in my district. The said Virgil Hicks on whom service was made was the person in charge of the place of business of said corporation."

On December 1, 1913, the court rendered default judgment against the plaintiff in error, The Stevirmac Oil & Gas Company. No judgment was rendered against Virgil Hicks, the other defendant. On May 18, 1915, The Stevirmac Oil & Gas Company filed its special appearance and motion to set aside said judgment, which special appearance and motion (omitting caption and signature) was as follows (Rec., p. 29):

> " Comes now The Stevirmac Oil & Gas Company, by its attorneys, Ramsey & de Meules, specially appearing, and appearing for the purposes of this motion only, and so appearing moves the court to set aside the purported judgment by default rendered herein on the first day of December, 1913; and for cause, The Stevirmac Oil & Gas Company, specially appearing as aforesaid, respectfully shows:
>
> " That the defendant, The Stevirmac Oil & Gas Company, is, and was at all times mentioned herein, a corporation; that the summons issued herein, named as defendants in the body thereof both Virgil Hicks and the Stevirmac Oil & Gas Company; that on the 13th day of October, 1913, Holmes Davidson, as Deputy United States Marshal, delivered to said Virgil Hicks at Sapulpa, Oklahoma, one copy (and only one copy) of said summons; that at that time H. H. McFann was president of the defendant corporation, and was in the town of Sapulpa, and was well known in said town; and had a regular place of business

and a regular residence in said town; that on October 13, 1913, said McFann was, on the morning and in the evening of said day, at his said place of residence in said town, and during the business hours of said day was a his place of business in said town; that the said Hicks was not in charge of the place of business of the defendant corporation; that at the time of the delivery of said copy of summons to said Hicks, said Davidson did not tell or inform said Hicks in any way that said copy was for defendant, The Stevirmac Oil & Gas Company, or that said delivery to said Hicks was intended as a service upon said defendant corporation; but said Hicks being himself named as a defendant in said summons, understood and believed that it was intended as a service upon him individually and not otherwise; that at the time of such delivery of said copy of summons to the said Hicks, the said Davidson inquired of said Hicks what was the name of the president of the defendant corporation, and where he could be found, and said Hicks then and there told said Davidson in response to said inquiry that H. H. McFann was president of the defendant corporation, that the said McFann was then in Sapulpa, and also told him where said McFann would be found; that the above and foregoing was all the service of summons that was made in this case; that no summons in this case was ever served on said McFann, and no service of summons has ever been made in this case on The Stevirmac Oil & Gas Company.

" That on the 15th day of October, 1913, the United States Marshal for the Eastern District of Oklahoma, returned into and filed in the office of the clerk of this court the original summons issued herein with his return thereon, which reads as follows, to-wit:

" U. S. MARSHAL'S RETURN.

"*Eastern District of Oklahoma*—ss.

" Received the within writ Oct. the 11th, 1913, and on the 13th day of October, I delivered a copy of this writ to Virgil Hicks, Tres in person at Sapulpa, Okla. The other defendant named herein was not served.

B. A. ENLOE, *U. S. Marshal,*
By HOLMES DAVIDSON, *Dep.*

" That thereafter, to-wit, on the 25th day of November, 1913, without any notice to your movant, this court made an order requiring and directing said marshal 'to amend the return upon the original process to conform with the facts.'

" That thereafter (the date thereof being unknown to your movant), without notice to your movant, the said marshal made a so-called amended return, reading as follows, to-wit:

" RETURN OF SERVICE OF WRIT.

"*United States of America, Eastern District of Oklahoma*—ss.

" I hereby certify and return that I served

the annexed summons on the therein named The Stevirmac Oil & Gas Company by handing to and leaving a true and attested copy thereof with Virgil Hicks personally, treasurer of said company, personally at Sapulpa, Oklahoma, in said district on the 13th day of October, A. D. 1913, the president, chairman of the board of directors or other chief officer not found in my district.

" The said Virgil Hicks on whom service was made was the person in charge of the place of business of said corporation.

B. A. ENLOE, *U. S. Marshal,*
By HOLMES DAVIDSON, *Deputy.*

" That the said amended return was and is, as above shown, false, in that *(1)* said Davidson, as Deputy United States Marshal, in delivering said copy of summons to said Hicks, did not intend to make the same as a service upon the defendant corporation; *(2)* the president of the defendant corporation was then in the Eastern District of Oklahoma, and in the town of Sapulpa, Oklahoma, and could have been found by the use of reasonable diligence, all of which was then and there known to the said Davidson; *(3)* the said Virgil Hicks was not in charge of the place of business of the defendant corporation; and *(4)* that the said Davidson did not at any time serve said summons on the Stevirmac Oil & Gas Company. That plaintiffs caused and procured said false amended return to be made by the said Davidson.

" That your movant had no notice or knowledge of said order of the court of said amended return until long after the judgment in this case was rendered, and therefore had no opportunity to show the truth of the facts now asserted by it, and the falsity of the statements contained in the amended return, and especially this defendant had no opportunity of having a hearing before said amended return was made, and no notice that such amended return was to be made.

" Defendant further shows that the records of this case fail to show that the marshal asked leave of the court or that the court granted leave to make such amended return as was made, and defendant therefore avers that no such leave was prayed and granted. It is true that the court ordered the marshal to amend his original return, but said return was complete upon its face, to show service upon Virgil Hicks, and that the defendant, The Stevirmac Oil & Gas Company, was not served, and that therefore this court had no power to require the marshal to make another or different return.

" That, therefore, said judgment was irregularly obtained without service of process upon defendant as required by law, and is void.

" And in support of the foregoing, certain affidavits are attached hereto and made a part hereof, and the Stevirmac Oil & Gas Company offers to introduce further testimony either oral or in the form of affidavits, as the court shall direct."

And at the same time The Stevirmac Oil & Gas Company filed the following affidavits (omitting captions and signatures):

" H. H. McFann of Tulsa, Oklahoma, being by me first duly sworn according to law, states upon his oath that at the first meeting of the board of directors of The Stevirmac Oil & Gas Company, he was elected its president and has continued as such, and was president of said company on the 13th day of October, 1913.

" That during the latter part of the year 1913, Virgil Hicks of Sapulpa, Oklahoma, asked affiant whether or not Holmes Davidson, a Deput United States Marshall, had served affiant with a summons in the case of *C. E. Ditman, et al., versus The Stevirmac Oil & Gas Company*, pending in the United States District Court for the Eastern District of Oklahoma, and that the said Hicks told affiant that the said Davidson had served said Hicks with a summons in said case either on that date or the date previous, and that in said conversation the said Hicks told affiant that he (Hicks) had told Davidson that affiant was the president of The Stevirmac Oil & Gas Company and was then in Sapulpa, and where affiant could be found on the date that service was made on said Hicks.

" Affiant does not recall whether Hicks said that service had been made upon him (Hicks) on the date of the conversation in question or on the date previous thereto, but affiant does know and states that he was in Sapulpa, Oklahoma,

on both of said dates at his usual place of business, and could have been found by the use of ordinary diligence.

" Affiant further states that during all the year 1913, he was a resident of the City of Sapulpa, Oklahoma.

" Affiant further states that he had no notice or knowledge of the order of court made in this case on the 25th day of November, 1913, or of the amended return made by the marshal, or of the judgment by default rendered herein, until long after said judgment was rendered." (Subscribed and sworn to by H. H. McFann.)

" Virgil Hicks of Sapulpa, Oklahoma, being by me first duly sworn according to law, states upon his oath that on the 13th day of October, 1913, Holmes Davidson, a Deputy United States Marshal, served a summons upon him, issued in the above entitled cause, by delivering to him a copy thereof at his office in the City of Sapulpa, State of Oklahoma.

" That only one copy of said summons was delivered to him and that said Davidson did not tell, or in any way inform this affiant that said copy of said summons was intended for any one else but affiant individually and did not tell or in any way inform affiant that said copy of summons was intended for The Stevirmac Oil & Gas Company, or intended as a service upon The Stevirmac Oil & Gas Company; that said Davidson had two summonses in his possession at the time, one for this affiant and the other for the

Stevirmac Oil & Gas Company, and after serving this affiant, inquired where and how he (Davidson) could make service upon The Stevirmac Oil & Gas Company, and in response to said inquiry affiant told said Davidson that H. H. McFann was president of The Stevirmac Oil & Gas Company, and was then in Sapulpa, and affiant told said Davidson how and where McFann could be found; that said H. H. McFann was, on the 13th day of October, 1913, the president of The Stevirmac Oil & Gas Company, and was, on said date, in the City of Sapulpa, State of Oklahoma, and could have been found by the said Davidson by the use of ordinary diligence; that at the time said copy of summons was delivered to this affiant as aforesaid, affiant was not in charge of the place of business of The Stevirmac Oil & Gas Company." (Subscribed and sworn to by Virgil Hicks.)

Notice of the filing of these papers was duly given to the plaintiffs. On December 27, 1915, the court after duly considering the matter, made the following order (Rec., p. 34):

" Now on this 27th day of December, A. D. 1915, came on to be heard the motion or application of The Stevirmac Oil & Gas Company to set aside the judgment heretofore rendered in this cause against it on the 1st day of December, 1913, and the court having considered said motion or application and having heard the argument of counsel thereon, and now being duly advised in

the premises, doth consider and adjudge that said motion or application, and the affidavits introduced by said The Stevirmac Oil & Gas Company in support thereof, do not state facts sufficient to entitle said The Stevirmac Oil & Gas Company to set aside the aforesaid judgment, and that, therefore, the court should not hear any evidence *de hors* the record for or against said motion or application.

"It is therefore, ordered, considered and adjudged that the said motion or application of The Stevirmac Oil & Gas Company be and the same is hereby overruled; to which ruling and decision of the court The Stevirmac Oil & Gas Company does duly except.

"It is further ordered that The Stevirmac Oil & Gas Company have thirty (30) days from this date in which to prepare and serve a bill of exceptions, five days for suggestions of amendments, to be thereafter settled upon three days' notice."

And on the same day a certificate was signed by the judge and filed in the case, certifying that the question involved and decided was whether the court had jurisdiction of the plaintiff in error when it rendered the default judgment of December 1, 1913 (Rec., p. 35).

SPECIFICATIONS *of* ERROR.

I.

The court below erred in making, without notice to the plaintiff in error, an order requiring the United States Marshal to amend his original return of service on the process, issued for the defendants in the commencement of the action below.

II.

The court below erred in permitting the said marshal without notice to the plaintiff in error, to amend said original return of service and to file an amended return of service in lieu thereof.

III.

The court below erred in rendering and entering judgment by default, in favor of the defendants in error, and against the plaintiff in error, without service of process on the plaintiff in error.

IV.

The court below erred in refusing to permit the plaintiff in error to show that no service of process had been made upon it in this cause.

V.

The court below erred in refusing to set aside and vacate the default judgment rendered December 1, 1913.

VI.

The court below erred in overruling and denying the application of the plaintiff in error to set aside such judgment.

VII.

The court below erred in permitting the United States Marshal to make and file as his purported amended return, after the expiration of the return date, a return contradictory to and not amendatory of his original return.

ARGUMENT.

The jurisdiction of the court below to render default judgment against the plaintiff in error was challenged, on the ground that the record failed to show that service of process was had on the plaintiff in error, and in support of this contention, the plaintiff in error referred to the original return of service of the officer on the process. The defendants in error contend that the record does show service of process on the plaintiff in error, and refer to the amended return on the process. The plaintiff in error contends that the officer had no right to make, and the court had no power to authorize, such amended return, and it cannot, therefore, be rightfully considered a part of the record. and to sustain this contention we assert two propositions: *First, when process has been returned, with an affirmative statement by the officer that the defendant has not been served, the return cannot be amended, after the date fixed for answer, so as to show the contrary. Second,* after the date fixed in the process for answer by the defendant, the return cannot, *without notice to the defendant,* be amended to show service upon the defendant, when the original return failed to show any valid service of any kind on defendant.

Reverting to the facts: The process named two defendants, namely, the plaintiff in error, The Stevirmac Oil & Gas Company, and Virgil Hicks, and the third day of November, 1913, was fixed in the process as answer day. On October 15, 1913, before the answer day, the marshal returned the process into court, certifying that he delivered a copy thereof to "Virgil Hicks, Tres in person," and that "*the other defendant herein was not served.*" On November 25, 1913, after the answer day, the court, apparently on its own motion, ordered the marshal to amend the return, and thereupon the marshal amended the return, to show that he served the process on The Stevirmac Oil & Gas Company, by delivering a copy to Virgil Hicks as treasurer of said company, and further certified that the president, chairman of the board of directors or other chief officer, was not found in the district.

In the motion to set aside the judgment, plaintiff in error asserted that the president of the company was in the district on the day of the alleged service, and, in fact was in the very town of Sapulpa where the service was alleged to have been made and could have been found by the use of reasonable diligence on the part of the officer, but that the officer made no such effort; that when the officer delivered a copy of the summons to Virgil Hicks, he did not tell Hicks

for whom it was intended, and Hicks believed that the service was intended for himself personally; that at the time of the alleged service, the officer inquired for the president of the corporation and was told by Hicks that he was in Sapulpa and where he could be found; that the facts stated in the amended return are false and that the plaintiffs caused and procured the false amended return to be made by the officer; and the plaintiff in error offered to introduce proof of these facts, but as will be noted, from the order of court overruling the motion, the court refused to hear any such proof.

No notice of the making of such amended return was given to the plaintiff in error, prior to the time the default judgment was rendered.

The Oklahoma law in regard to service of summons on a corporation is contained in section 4715, Revised Laws of Oklahoma, 1910, reading as follows:

> " A summons against a corporation may be served upon the president, mayor, chairman of the board of directors, or trustees, or other chief officer, or upon an agent duly appointed to receive service of process; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent, or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business

of such corporation, with the p e r s o n having charge thereof."

Under this section it has been held by the Oklahoma Supreme Court that a summons for a corporation can be served on its cashier, treasurer, and the like, only when the president, mayor, chairman of the board of directors, or trustees, or other chief officer *cannot be found in the jurisdiction,* and that fact must be stated in the return; otherwise, the service and return are void, and any judgment founded thereupon is also void:

Cunningham v. *Rorer,* 25 Okla. 133, 105 Pac. 676;

Ozark Marble Co. v. *Still,* 24 Okla. 559, 103 Pac. 586;

Ravia v. *Wilson,* 22 Okla. 689, 98 Pac. 949;

St. L. & S. F. R. R. Co. v. *Clark,* 17 Okla. 562, 87 Pac. 430.

Reverting now to the two propositions stated above, which can conveniently be discussed together:

PROPOSITION ONE:

When process has been returned with an affirmative statement by the officer that defendant has not been served, the return cannot be amended, after the date fixed for answer, so as to show the contrary.

PROPOSITION TWO:

After the date fixed in the process for answer by the defendant, the return cannot, without notice to the defendant, be amended to show service upon the defendant when the original return failed to show any service upon such defendant.

A party defendant cannot be required to appear in court and be subjected to its jurisdiction unless served with process, or the defendant waives service of such process, and the federal courts are bound by this rule no less than the state courts:

2 Bates Fed. Procedure, 1003.

A corporation defendant, therefore, is not required (any more than an individual) to appear in court because it knows that suit has been instituted against it (see *National Metal Co.* v. *Greene,* 9 Ariz. 192, 89 Pac. 535), although an officer authorized to serve process notifies, by word of mouth, some official of the corporation—even though he be the president —that there is a suit pending against the corporation in the court; for original process in the commencement of an action is universally understood to mean a formal written notice. It is so defined in 32 Cyc 419. An illustration of this is afforded by *Cunningham* v. *Rorer,* 25 Okla. 133, 105 Pac. 676.

In that case the president of the defendant corporation met, on the street, an officer having process to serve on the corporation, and conversed with the officer concerning the service of such process, but the officer did not deliver a copy of the summons to the president, but did deliver such copy to the secretary of the corporation and it was held that such service upon the secretary was void, since the president of the corporation was within the jurisdiction.

What is service of process? In all cases where personal service can be had, there must be personal service:

> *McDermott* v. *Board of Police,* 25 Barb. (N. Y.) 635;
>
> 32 Cyc 448.

Personal service means the delivery of a copy of the process to the party to be charged.

> " The term 'personal service' has a fixed and definite meaning in law. It is service by delivery of a writ to the defendant personally."
>
> —*First National Bank of Casselton* v. *Holmes,* (N. D.) 94 N. W. 764.

> " Personal service is the delivery of an original written notice or other paper or copy thereof, with original information as to contents to the person affected by the service."
>
> —*Minard* v. *Burtis,* 83 Wis. 267, 53 N. W. 509.

To same effect:

Moyer v. *Cook*, 12 Wis. 335;
McKenna v. *State Insurance Co.*, 73 Iowa 453, 35 N. W. 519.

We assert, therefore, that even if the president of a corporation, or other officer thereof entrusted with the charge of its litigation, is aware that a suit is pending against it in court, that fact is not sufficient to bring the corporation within the jurisdiction of the court, but such officer, if advised of the pendency of the suit, has the right to examine the court files and records to see whether service is purported to have been had on the corporation, and, if on the answer date named in the original process such process had been returned into court with an *affirmative recital in the return by the officer that the same has not been served upon the defendant*, the defendant may rely upon the truth of such recital; and we furthermore say that after the answer day the officer is himself bound by such recital, and is estopped, especially without notice to the defendant, to amend such return so as to contradict it, and to show service upon the defendant, when the original return affirmatively showed that there had been no such service. The principle of estoppel applies here. When one has made a public record of facts whereby another, relying thereupon, and having the right to so rely,

is misled to his detriment, the one making the record is estopped from afterward denying the truth of such record. In a collateral proceeding the return of an officer is conclusive against him—though not conclusive in his favor; and this is so upon the principle of estoppel:

Baker v. *McDuffie*, (N. Y.) 23 Wend. 289;
Simmons v. *Bradford*, 15 Mass. 82;
Duncan v. *Gerdine*, 59 Miss. 550;
Barnett v. *Copeland*, 18 Vt. 67, 44 Am. Dec. 362;
Henry v. *Stone*, (Va.) 2 Rand. 455.

In *Smith* v. *Martin*, 20 Kan. 572, the late Mr. Justice BREWER (then on the Kansas bench) said:

> "When an officer makes a return upon a summons, it is, to say the least, as against him *prima facie* correct, and he should not be permitted to amend it until he makes it clear that it was erroneous. This, true in all cases, is especially true when the effect of the return as first made fixes a liability upon him, and the amendment would relieve him from liability. And still more true, when the party in whose favor the return was made, resting upon the faith of the return, would suffer loss by the amendment."

See also *Montgomery* v. *Merrill*, 36 Mich. 97.

It seems to be well established that amendments are never allowed when rights of third parties have intervened or are likely to be affected thereby:

32 Cyc 531 (authorities cited in note 81).

And this is so because such third parties have the right to rely on the truth of the return.

It may be said that a defendant should himself know when process is served on him, without having to rely on the truth of the return. However true this may be with reference to an adult natural person, in full possession of his faculties, when he is actually served in person—and in such case there may be considerable force in the contention—it is only necessary to point out that in this case the defendant which is claimed to have been served was a corporation (an artificial person), and the agent of the corporation, through whom the service is claimed to have been had upon the corporation, was its treasurer, upon whom, under the Oklahoma law, service could not have been made unless the president or other chief officer could not be found in the jurisdiction; and it is further to be noted that *the person so served was also named individually in the process as a defendant, and only one copy of the process was delivered to him.* In such case, the presumption would be that he was served on his own individual account,

and not as agent of the corporation, and he would have the right himself to so assume. There could be no supposition, therefore, from these circumstances, that the corporation knew it had been served. Quite properly, if the matter of the suit were brought to the attention of the corporation, it might, to satisfy itself, cause the record to be examined, and if on the answer date the process had been returned and the return recited that the process had *not been served on the corporation defendant*, the corporation would be justified in relying thereon. It had at least a right to assume that the return would not be changed thereafter without notice to it. Such a return therefore operated as an estoppel against the officer, and the right of the officer being wanting, the court had no power to grant him the right. (See argument under proposition three, *infra.)*

The presumption is that dealings with a person are on his individual account, and not as the agent of another:

31 Cyc 1638.

Here, Virgil Hicks, the person served, was not the chief officer of the corporation, and presumably had nothing to do with its litigation, and in the absence of statute, the corporation could not have been served through him at all:

Young v. *Dexter,* 18 Fed. 201.

He was named individually as defendant, and only one copy of the process was delivered to him.

How, then, was Virgil Hicks to know, and in turn convey the knowledge to the corporation, that the corporation, and not he, had been intended to be served? Even if we concede the officer had actually intended to serve the corporation (which is not the fact).

Service of process must be made in such a manner as reasonably to apprise the party affected that it was so intended. As, for instance, if the party be, at the time, not in full possession of his faculties, such fact, if shown, will render the service void:

Midler v. *Judge,* 38 Mich. 310;
Correll v. *Granget,* 12 Misc. (N. Y.) 209, 34 N. Y. Sup. 25, 67 N. Y. State 892;
Murphy v. *Loos,* 104 Ill. 514.

It is for this reason that where there are two or more defendants named in a summons, there must be proper service on each, even where they reside in the same house, in order that each will understand that he has been served:

Bugbee v. *Thompson,* 41 N. H. 183;
Rogers v. *Buchanan,* 58 N. H. 47;

Butts v. *Francis*, 4 Conn. 424;
Anderson v. *Brown*, 16 Tex. 554;
Covington v. *Burleson*, 28 Tex. 368.

Doubtless it will be conceded that if the summons were wadded up into a ball and handed to the defendant without an explanation, it would be no service. In short, personal service means the delivery of a copy of the writ to the defendant, under such circumstances that he will understand that it is intended for him, or if intended for service upon him as agent, that it is intended to be so served upon him in that capacity. We therefore say that a defendant, especially a corporation defendant, is not always supposed to know, or to be deemed to know, when service of process has been had upon him or it, and the present case is a very good illustration. If this premise be true, then the defendant had a right to examine the process when returned into court, and ascertain whether or not it was claimed that service had been made upon it. If, on the date fixed in the process for answer, the return recited that no service had been had upon the defendant, it had the right to rely upon the truth of such recital.

It was stated on argument in the court below that there were numerous cases where the officer had been allowed to amend his return, sometimes, long

after judgment had been rendered. In answer to that we said that in the cases so holding—at least the soundly reasoned cases—the original return purported to show service upon the defendant, but there was some defect or incompleteness in the manner of statement appearing upon the face of the original return, or there was some error as to the time or place of service or the name of the person on whom service was made.

We said that this case must be distinguished from other cases, in that, here, the original return shows *affirmatively that there had been no service upon the plaintiff in error*, The Stevirmac Oil & Gas Company. *There was, therefore, no return of purported service upon the Stevirmac Oil & Gas Company to be amended so as to show valid service upon it. It was not an amendment, but an entirely new return which the officer made. To authorize an amendment, there must be something to amend as well as to amend by.*

> "An amendment * * * necessarily implies something upon which the correction, alteration, improvement or reformation can operate; something to be reformed, corrected, rectified, altered, or improved. In other words, that which is proposed as an amendment must be germane to or relate to the thing to be amended."
>
> —*In re Pennsylvania Tel. Co.*, (Pa.) 2 Chest. Co. Rep. 129, 131.

> " An amendment is the correction of some error or mistake in a pleading already before the court, and there must therefore be something to amend by; whereas the insertion of facts constituting a new cause of action or defense would be a substituted pleading, and not an amendment of an existing pleading."
>
> —*Woodruff* v. *Dickie,* 28 N. Y. Super. Ct. (5 Rob.) 619, 622.

> " An 'amendment' is a correction of some error or mistake in a pleading or before the court, and there must therefore be something to amend."
>
> —*Givens* v. *Wheeler,* 6 Colo. 149, 151.

> " To destroy is not to amend. A thing amended survives."
>
> —*Ensley* v. *Simpson,* 166 Ala. 366, 52 So. 61.

The court below apparently did not deny this proposition. But, said the court: The original return contained the word "Tres" after the name of Virgil Hicks, and this at least raises the suspicion that Virgil Hicks was not served in his individual capacity, and therefore it was competent to show by amendment in what capacity he was served.

With the utmost respect for the court below, we cannot help but feel that the court went far afield

to place such exceptional and, as we think, unwarranted significance upon the word "Tres". Virgil Hicks was himself named as a defendant in the process, and the unintelligible word "Tres" should have been treated as mere surplusage, and omitted, leaving the return entirely complete. At the most, the word "Tres" was mere *descriptio personæ*, not affecting the meaning of the remainder; as, for instance, the word "administrator," etc., after the name of a grantee in a deed does not limit the estate, but is merely a description of the person.

The return was good as to Hicks in his proper person and he could not escape a default judgment because the word "Tres" appeared after his name in the return:

1 Jones, Real Property, section 223.

For the same reason, the addition of "Sr." or "Jr." to the name of the defendant in a writ or return is not regarded as material:

Dawson v. *The State Bank*, 3 Ark. 505;
Sanders v. *Dowell*, 7 Sm. & M. (Miss.) 206.

In *Cornell* v. *Green*, 95 Fed. 334, a subpœna was issued naming as defendants, among others, William F. Tucker, and also "William F. Tucker, Executor," etc. The return recited that the marshal served the

writ by delivering a copy to "William F. Tucker, as Executor". The court said (our italics):

> " The recital by the marshal as to the character in which William F. Tucker was served is an immaterial matter. * * * My conclusion is that Mr. Tucker was served with process; that *the jurisdiction over him personally was complete.*"

In other words, the addition in the return of such words as "executor," etc., to the defendant's name was immaterial; the jurisdiction thus acquired over him being personal or as an individual, which was sufficient to support the decree. The delivery of the copy to him charged him with personal service, notwithstanding the addition of the words "as executor", and the addition of such words did not make the service any the less a service upon Tucker personally.

But, whatever may have been the meaning of the word "Tres", the return did show personal service upon Virgil Hicks, and certified affirmatively that "the other defendant named herein" was not served.

It recited that a (meaning one) copy of the process was delivered to Virgil Hicks in person. This is personal service, as we have already shown. It stands to reason that if a copy of the summons

was delivered to Virgil Hicks in person, it was served upon him individually and personally, and if "the other defendant named herein" was not served, the words, "the other defendant", naturally refer to The Stevirmac Oil & Gas Company, since Virgil Hicks and the Stevirmac Oil & Gas Company were both named as the only defendants in the process.

It could not be claimed that, a copy of the summons having been delivered to Virgil Hicks, and he being named individually as a defendant in the process, yet he was not served. That would be a contradiction in terms. It might have been claimed that another copy was delivered to him as a service upon the corporation, but the original return expressly denies that; it says "the other defendant herein was not served".

PROPOSITION THREE:

Even assuming, without conceding, that the court had the power to authorize an amendment of the return, after the answer date, it could only be done *(a)* upon notice to the defendant, and *(b)* upon the prior application of the officer.

(A) When the return is made by the officer it becomes a part of the records of the court and within the control of the court; but if any amendment there-

of is to be made, the data therefor must be furnished by extrinsic proof—that is to say, the data for such amendment cannot be supplied from any of the records of the court, nor from the judge's recollection of any proceedings that took place in the court.

As long as the officer retains the process in his possession he has control over it, and can change the return as he sees fit. In fact, it does not become an official return until the process is filed, but the moment it is filed it becomes a part of the records of the court, and, like any other record of the court, may not be amended without leave of the court. A very clear exposition of the principles covering the subject of amending returns is afforded by *Wilcox* v. *Moudy*, 89 Ind. 232:

> " It (the proceeding to amend a return) was *a proceeding to correct a record,* but not an application for an entry *nunc pro tunc,* or an amendment of an entry relating to a judicial act, which had been omitted from the record or incorrectly recorded through clerical misprision. The return is made by the sheriff, and he is responsible for it. The court cannot correct it, as it may the misprision of the clerk; nor can it order the sheriff to correct it. While the writ is in his control, he may make or alter it to his own satisfaction. After he has filed his return, though it can only be corrected by him, it is a matter of record, and can only be corrected by permission

of the court *of whose records it forms a part;* and this permission should be granted where the amendment will cause the return to speak the truth, and will be for the furtherance of justice, *and has been properly asked.* That the court may exercise a sound discretion, it may be enlightened by any material and competent evidence, including oral evidence."

Since, as we have pointed out, the data for the amendment of a return must be supplied extrinsically, when the original return fails to show valid service upon the defendant, and the amendment of the return is necessary to confer or uphold jurisdiction, notice to the party to be adversely affected is necessary before such amendment can be made.

Amendment of a record, requiring extrinsic proof, is, when made without notice to the party to be adversely affected, at least voidable; and when such amendment is necessary to uphold or confer jurisdiction, and without which the record would fail to show jurisdiction, such an amendment, without notice, is void.

In the careful language of the Circuit Court of Appeals for the Sixth Circuit:

" At all events, it would seem, upon the authorities that corrections of the record made by the court upon its own recollection would not be

collaterally assailable, though made without notice. If the action is based upon other evidence it would seem to be settled by a preponderance of authority that notice is required, and that the proceeding for correction would be void without it."

—*Odell* v. *Reynolds,* 70 Fed. 656.

Other courts have been more strict in their construction of the power to amend; for instance, some courts will not permit an amendment unless there is something of record to amend by, and even where the power of amendment is more liberally conceded it is almost universally the rule that where there is nothing of record, and nothing within the recollection of the judge—so that it is necessary to show the fact desired to be established from other evidence—notice is essential.

—18 Enc. Pl. & Pr., 923.

This rule—especially true with reference to supplying jurisdictional facts—is just as applicable to the amendment of a return, after it is filed, as to any other matter of record. The case of *Montgomery* v. *Merrill,* 36 Mich. 97, is an illustrative one. An amendment of the return (without which amendment the record failed to show jurisdiction) was made without notice to the defendant, and the judgment was collaterally assailed. The attack was sus-

tained in an opinion by Judge COOLEY, who enunciated the following principles:

> " Where the record itself furnishes the data for the required amendment, great liberality should be allowed because the danger of injustice in permitting amendments is very slight. *Emery* v. *Whitwell*, 6 Mich. 474. But where the amendment is to be made on an extrinsic showing, all practicable precautions should be taken that no one is wronged by the action of the court; and as most facts are susceptible of contradiction, there ought always, when practicable, to be notice to the party adversely interested, in order that he may have the opportunity to make a counter showing * * *. In *Denison* v. *Smith*, 33 Mich. 155, it was decided that a party who would be affected by an amendment of proof of service could not be bound by one which was made *ex parte*. The right to notice in such cases is affirmed by Mr. Freeman in his treatise on Judgments, Sec. 72, who cites cases in its support. It is also recognized tacitly by the great majority of all the cases cited by the plaintiff's counsel on the argument, for the amendments sanctioned by them were made on notice and after a hearing. We refer to the following cases which either expressly affirm the right or tacitly recognize it (citing a large number of cases). The requirement of notice is only a matter of common right in such cases, for the party is condemned unheard if an amendment is allowed which gives to the proceedings an effect adverse to his interests which they did not have before,

without his being allowed the opportunity to dispute and disprove the grounds of the action. In a few cases, amendments made on *ex parte* showing have been supported, but we cannot regard them as consistent with principle."

Missouri follows the common-law rule, that the return of an officer is conclusive upon parties and privies, yet the principles above stated are followed there. In *Little Rock Trust Co.* v. *S. M. & A. R. Co.*, 195 Mo. 669, 93 S. W. 944, the sheriff, without notice to the defendant, filed an amended return. The court said:

" This proceeding was without notice, and therefore not binding on the defendants, as a sheriff has no absolute right to amend a return. The right to amend a return rests in the sound judicial discretion of the court, and the party to be affected by the amendment has a right to a day in court before the court has a right to permit the amendment. *Feurt* v. *Caster*, 174 Mo. 289, 73 S. W. 576."

Other cases supporting the rule that a return may be amended, in the sound discretion of the court, *upon notice to the parties to be adversely affected thereby*, are:

Park Land Co. v. *Lane*, 106 Va. 304, 55 S. E. 690;

Jeffries v. *Rudolff*, 73 Iowa 60, 34 N. W. 756;

Wittstruck v. *Temple*, 58 Nebr. 16, 78 N. W. 456;

Shufeldt v. *Barliss*, 33 Nebr. 785, 51 N. W. 134;

Coopwood v. *Morgan*, 34 Miss. 368;

Williams v. *Oppelt*, 1 Smed. & M. (Miss.) 559;

Cochrane v. *Johnson*, 95 Mich. 67, 54 N. W. 707.

Indeed, the principle that a party is not bound by a record, made without notice to him, is fundamental. This court, in *Harris* v. *Hardeman*, 14 How. 334, 14 L. ed. 444, quotes approvingly from *Starbuck* v. *Murray*, 5 Wend. 156, as follows:

> " This doctrine does not depend merely upon adjudged cases; it has a better foundation; it rests upon principles of natural justice. No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence, without the privilege of showing, if he can, the claim against him to be unfounded. * * * But it is contended that if other matters may be pleaded by the defendant, he is estopped from asserting anything against the allegations contained in the record. It imports perfect verity, it is said, and the parties cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the

> defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and therefore the supposed record is, in truth, no record. If the defendant had not proper notice of, and did not appear to, the original action, all the state courts, with one exception, agree in opinion that the paper introduced as to him is no record, but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense, by a process of reasoning, that, to my mind, is little less than sophistry. The plaintiffs, in effect, declare to the defendant the paper declared on in a record, because it says you appeared; and you appeared, because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped from proving any fact which goes to establish the truth of a plea alleging the want of jurisdiction."

Of course, the amendment of a return to show jurisdiction where the original return fails to show jurisdiction of the defendant, must be made before the judgment is rendered; for where judgment is rendered upon a record which does not show legal service, the error is jurisdictional and the judgment

is fatally defective. *Hall* v. *Graham,* 49 Wis. 553, 5 N. W. 943. This must be true unless it be conceded that the party adversely affected by the amendment may come in at any time and contradict it; and, if that be conceded, then it follows, as the day follows the night, that the court below committed error when it refused to permit the plaintiff in error to introduce proof to contradict the amended return.

(B) Again assuming, without conceding, that the court may authorize the officer to amend his return, after the date fixed for answer, so as to show service upon the defendant, when the original return affirmatively showed the contrary; yet, the court cannot compel or order the officer to do so, but the amendment must be upon prior application and showing made by the officer. The record in this case does not show that the officer made any application to amend his return, or any showing as to the truth of the amendment, but the order requiring the amendment appears to have been made by the court on its own motion.

The universal rule is that the officer is responsible for the truth of his original return, and also in the amendment thereof, and that he must be allowed to determine for himself, whether or not he desires to make an amendment, and he cannot be coerced by the court in that respect. *Wilcox* v. *Moudy,* 89 Ind.

232; *Washington Milling Co.* v. *Kinnear,* 1 Wash. Ter. 99; *Sawyer* v. *Curtis,* 2 Ashm. (Pa.) 127. If the court has the power to compel the officer to amend his return, without his request, it follows that the proof must be furnished extrinsically, which means that there must be a hearing, at which evidence, pro and con, can be adduced by the parties to be affected thereby, and due process of law requires that the parties have notice of such hearing, and an opportunity to produce their evidence. Such notice was not given in this case.

Of course, even if the officer requests authority to amend his return, it is within the court's discretion to permit it, and the court should first satisfy itself as to the truthfulness of the proposed amendment. That is to say, the right of the officer and the power of the court are mutual and dependent.

The lower court conceded this to be true where the original return was definite and complete, but claimed the power to act in this case without the previous request of the officer because, so it said, the original return was incomplete. But we have shown the contrary in our argument under Propositions One and Two. The original return plainly showed personal service upon Virgil Hicks, and no service upon the plaintiff in error.

PROPOSITION FOUR:

The defendant had the right to contradict the marshal's amended return.

Assuming, without conceding, that the amendment to the return was properly authorized, we assert the right of the defendant to contradict the amended return, especially when it had no notice thereof until after the judgment.

It is said that in the Federal court, following the common law rule, a defendant will not be permitted to contradict the truth of the officer's return, but it has been decided by the Supreme Court of Oklahoma, where this case arose, that an officer's return is not conclusive, and the defendant may dispute it, and show that it is false; *Ray* v. *Harrison*, 32 Okla. 17, 121 Pac. 633. The reasoning of the court appeals to us. It states the modern doctrine, which, in our humble judgment, is far the better rule. We therefore quote from the opinion:

> " It is argued, however, that as the constable's return showed personal service on both these defendants, one of whom was dead, and the other a non-resident of the territory, that that return must be taken as conclusive evidence of the facts stated, and a number of cases support this rule. *Goddard* v. *Harbour*, 56 Kan. 744, 44 Pac. 1055, 54 Am. St. Rep. 608 and other

cases therein cited. We do not, however, perceive the justice of this rule. It is fundamental that a judgment rendered without notice is void, and to make an officer's return, which is false, conclusive evidence against the truth, is not in harmony with reason or justice, and we think that the better rule is that while such return is *prima facie* evidence of its truthfulness, and while it requires clear and convincing proof to set it aside, it is the duty of the court, when evidence meets the test, to act upon it, and not permit an established falsehood to stand as true. *Southern Pine Lumber Company* v. *Ward*, 16 Okla. 131, 85 Pac. 459; *Quarles* v. *Heirn*, 70 Miss. 891, 14 South. 23; *Duncan* v. *Gerdine*, 59 Miss. 550; *Watson* v. *Watson*, 6 Conn. 334; *Dunklin* v. *Wilson*, 64 Ala. 162; *Dozier* v. *Lamb*, 59 Ga. 461; *Du Bois* v. *Clark*, 12 Colo. App. 220, 55 Pac. 750; *Kochman* v. *O'Neill*, 102 Ill. App. 475, decree affirmed 202 Ill. 110, 66 N. E. 1047; *Buck* v. *Hawley*, 129 Iowa 406, 105 N. W. 688; *Campbell Printing Press & Manufacturing Co.* v. *Marder*, 50 Neb. 283, 69 N. W. 774, 61 Am. St. Rep. 573. The reason for the rule we adopt is well stated in 2 Wigmore on Evidence, Art. 1348, p. 1639, as follows: 'To forego investigation into the existence of a fact because a certain officer not having judicial powers or opportunities of investigation has declared it to exist or not to exist and to accept his statement as conclusive and indisputable is in effect to refuse to exercise, as regards that specific fact, that function of the investigation and final determination of

disputes which is the peculiar attribute of the judiciary as distinguished from the executive and the legislative'."

It cannot be said that a suit against an officer for false return is an adequate remedy, for the defendant must, without a day in court, first pay out his money in satisfaction of a judgment of which he had no notice, which may in many cases be without any merit whatever, and when he may justly owe the plaintiff nothing, and then after he is out of the use of his money, take his chances on recovering it back from the officer. It makes the defendant bear all the risks and deprives him of the use of that to which he is legally entitled for probably a long period of time; whereas under the modern doctrine, a complete remedy may be quickly and conveniently afforded by simply permitting proof of the falsity of the return to be shown by an appropriate proceeding in the same case.

The common law rule—that the return is conclusive—has been so often criticized that it is not followed in probably the majority of states, and even where ostensibly followed, so many innovations have been made upon it that the rule is practically disregarded. In Georgia where the common law rule formerly existed, it has been abolished by statute. In Illinois, if not entirely disregarded (*Allegreti* v.

Stubbert, 126 Ill. App. 171), the rule has been so relaxed as to permit a return to be contradicted for the purpose of excusing a default (*Cooke* v. *Haungs*, 113 Ill. App. 501), and it seems to have been further held that upon direct attack, that is, a motion to vacate a judgment, it may be contradicted (*Scrafield* v. *Sheeler*, 18 Ill. App. 507). While the common law rule seems to be followed in Kansas, the late Mr. Justice BREWER, when on the Kansas bench, did not seem to be in accord with it, in *Starkweather* v. *Morgan*, 15 Kan. 274. Although the rule seems to be established in New Hampshire, it does not seem to have been followed in *Clough* v. *Moore*, 68 N. H. 111, where the return was allowed to be shown to be false. Although originally the rule in Rhode Island, it seems not to have been followed in *Locke* v. *Locke*, 18 R. I. 716, 30 Atl. 422, on a motion to vacate a judgment. In some of the states the common law rule has been openly repudiated, and at the present time we think it can be safely asserted that it is not followed in Alabama, Arizona, Connecticut, Iowa, Michigan, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, South Carolina, Texas, Washington, New York, Wisconsin, Minnesota, Colorado and South Dakota. Judge A. C. FREEMAN, in a note to *Taylor* v. *Lewis*, 19 Am. Dec. 137, uttered the following criticism of the common law rule:

"* * * It would seem to be one of those self-evident axiomatic propositions that might be safely asserted, without fear of successful contradiction, that no greater fraud can be perpetrated than to deprive a person of his property without giving him an opportunity to be heard in its defense. To do so, is repugnant to our sense of natural justice, opposed to the underlying principles of all free governments, deriving their authority from a written constitution, and is seldom, if ever, sanctioned, except where might, and not right, prevails. Yet, the authorities just quoted undoubtedly have that effect, for when it is asked, and that, too, of those marvels of wisdom and guardian angels of the rights of persons, courts of equity, to relieve against the commission of such an outrage, fraud *per se*, it might truthfully be said, and to prevent one man through the medium of the courts of justice from confiscating the property of another, their answer is, inasmuch as you have a cause of action against the officer for making a false return, we will deny you the relief sought, allow the constitution to be violated, and your property confiscated. Fortunately, however, the authorities quoted have not been followed in this country. A contrary rule prevails, and a judgment at law may be vacated or relieved against in equity, when it is made to appear that it is unjust, and that the court in pronouncing it acted without jurisdiction. *Harshey* v. *Blackmarr*, 20 Iowa 161; *Walker* v. *Gilbert*, Freem. Ch. 85; *Miller* v. *Gorman*, 38 Pa. St. 309; *Ridgeway* v. *Bank of Tennessee*, 11 Humph. 522; *Brooks* v. *Harrison*,

2 Ala. 209; *Crafts* v. *Dexter*, 8 *Id.* 767; *Ingle*
McCurry, 1 Heisk. 26; *Bell* v. *Williams*, 1 He
229; *Estis* v. *Patton*, 3 Yerg. 381; *Landrum*
Farmer, 6 Bush. 46; *Johnson* v. *Coleman*,
Wis. 452; Freeman on Judgments, Sec. 49
Owens v. *Ranstead*, 22 Ill. 161; *Newcombe*
Dewey, 27 Iowa 381; *Stone* v. *Skerry*, 31 *Id.* 5

" A leading case in favor of the jurisdicti
and in which the reasons for maintaining t
the same are ably advanced is *Ridgeway* v. *Ba*
of Tennessee, 11 Humph. 525. TOTTEN, J., spea
ing for the court, said: 'We may conclu
then, that in the circumstances of this case the
is no remedy at law against the judgment
question. The action for a false return is
inadequate remedy for such an injury; for
might be that after ruinous sacrifice, suffered
the payment of a judgment so recovered, a
the delay and expense of litigation with the
ficer who made the false return, he might be u
able to make the proper indemnity, or succe
in evading his liability. The fact that there
no remedy, or no sufficient remedy at law, f
this admitted injury, is a strong reason wh
there should be remedy in equity.' In the *M*
rine Ins. Co. of Alexandria v. *Hodgson*, 7 Cranc
332, Chief Justice MARSHALL says, 'that any fa
which clearly proves it to be against conscien
to execute a judgment, and of which the injur
party could not have availed himself in a cou
of law; or of which he might have availed hi
self at law, but was prevented by fraud or a
cident, unmixed with any fault or negligence

himself or his agents, will justify an application to a court of chancery.' * * * Now, in the present case, this principle should apply with the greater force, because the judgment in question is to be considered as void by reason of an extrinsic fact, which cannot be averred or be made to appear in a court of law, and a court of law has not therefore any power to arrest its execution, however unjust or iniquitous. * * * We can not doubt that in the view of a court of equity, it is unjust and unconscientious to attempt to enforce a judgment so obtained. We may further observe that if a sheriff make a false return by collusion with a party, or by mere mistake, a court of equity has an unquestionable jurisdiction to interpose, and give the appropriate relief; and to give effect to this remedy, the party injured should, of course, be permitted to aver against the truth of the return, and show it to be false, though it be matter of record."

Mr. Black, in his article on Judgment, in 23 Cyc 915, makes the following distinction in the application of the common law rule:

" Although an officer's return of service is usually conclusive between the parties, this is not so on motion to open or vacate judgment; it may be traversed and the judgment set aside, if the return is shown to have been false."

But whatever may be the rule with reference to the original return, we claim that it does not apply to an amended return, especially when the amendment is made *ex parte* and contradictory of the original return. An officer may make such return originally as he sees fit, being responsible in damages for its falsity. In many jurisdictions, as we have shown, it may be attacked directly and shown to be false, but assuming that in the Federal courts the common law rule will be followed, that the truth of the original return may not be attacked directly, it would seem that *a fortiori* it should not be impeachable by the one who made it. (*Hunter* v. *Stoneburner*, 92 Ill. 75.)

And though the officer may make such return originally as he sees fit, this fails to be true after he has once made his return, as he then has no arbitrary right to alter it as he chooses. He must invoke and obtain the assistance of the court, and then he has no right to make an amendment unless the court is satisfied of the truth of the amendment. There should be a hearing, and according to the principle of due process of law, all parties to be affected thereby should be heard. If the hearing is *ex parte*, then the other parties to be affected should be allowed afterwards to come in and be heard.

In *Park Land Company* v. *Lane,* 106 Va. 304, 55 S. E. 690, the court says (italics ours):

> " When the summons was returned and filed, the return on it became a matter of record, and could not be amended without permission of the court. *Goldsby* v. *St. John,* 25 Grat. 146, 160, 4 Minor, Inst., 937; *Stotz* v. *Collins & Co.,* 83 Va. 423, 2 S. E. 737; Freeman on Executions, section 358. This permission is usually granted upon proper application made in the cause in which the writ or summons issued. But it is not granted as a matter of course, but only in the furtherance of justice and the exercise of an enlightened discretion after notice to the opposite party. Code 1904, Sec. 3451; 3 Freeman on Executions, Sec. 358; *Shenendoah Valley R. Co.* v. *Ashby's Trustees,* 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.
>
> " The object of the amendment of a record as Mr. Freeman says, whether made by the court in the entries on its minutes, judgments, or other proceedings or by the sheriff in the history of his proceedings, as stated in his return, is, or always should be, to obtain a record which shall speak the exact truth. The court will not suffer a proposed amendment to be made without first being satisfied that it is true. 3 Freeman on Executions, *supra; Bayley, Petitioner,* 132 Mass. 457. *The court therefore properly permitted the parties to introduce evidence* as to the question whether or not, when the deputy sheriff delivered a copy of the summons to the wife of the appellee, he explained its purport to her."

PROPOSITION FIVE:

If the false return, or amendment thereof, was procured by the plaintiff, the rule that the return is conclusive does not apply.

The decision of the lower court was, we take it, based upon the ground, *first*, that it had the power to require the return to be amended without notice, and *second*, having this power, the amended return was, like the original return, conclusive, and could not be contradicted. For this reason the court refused to receive evidence in contradiction of the amended return.

Assuming, without conceding, that the court had the power to require an amended return to be made, without notice to the plaintiff in error, the trial court was in error in refusing to receive the evidence, because it was alleged and offered to be proved by the plaintiff in error, not only that the amended return was false, but that the plaintiffs (the defendants in error) caused and procured said false amended return to be made by the officer.

Even in those jurisdictions where the common law doctrine—that the return is conclusive—is in force, it is subject to the exception that where the false return is procured or induced by the plaintiff, it may be contradicted and is not conclusive.

In *Ramsburg* v. *Kline,* 96 Va. 465, 31 S. E. 608, the court says:

> " The return of an officer, showing that summons to commence suit has been duly executed, cannot be contradicted by the defendant unless it can be shown that the plaintiff procured or induced the return or was in some way connected with the deception. It is immaterial whether the objection be made at law or in equity."

In 32 Cyc 514, the law is thus stated:

> " * * * The English common-law rule, which is also the rule in many American states, is that, as between parties and privies, the return of an officer is to be taken as true, as to all matters which are properly the subject of a return by the officer, and it can be controverted only in an action against the officer for a false return, unless it is contradicted by other matters appearing of record in the case, or unless the false return was procured or induced by plaintiff, or resulted from the mistake of the officer. * * * "

In *Walker* v. *Robbins,* 14 How. 585, 14 L. ed. 552, this court denied the power of equitable relief against a judgment rendered on a false return "where the plaintiff at law was not at fault." The court said in part:

> " Assuming the fact to be that Walker was not served with process, and that the marshal's

return is false, can the bill in this even be maintained? The respondent did no act that can connect them with the false return; it was the sole act of the marshal through his deputy, for which he was responsible to the complainant Walker, for any damages that were sustained by him in consequence, by the false return * * * If the court of chancery can be called upon to correct one abuse, so it may be called upon to correct another, and in effect to vacate the judgment where the tribunal rendering same would refuse relief thereon, either on motion or on a proceeding by *audita querela.*"

To the same effect is *Knox County* v. *Harshman,* 133 U. S. 156, 10 Supreme Court 258, 33 L. ed. 586.

The reasonable inference from the language above quoted is that where the false return was procured or induced by the plaintiff, or party in whose favor the judgment is rendered, the party benefitted by the judgment cannot resist an attack on the return on the ground that it is conclusive. Here comes into play the axiomatic principle that no one can profit by his own wrong. *Ex causa turpi non oritur actio; nullus commodum capere potest de injuria sua propria (Northwestern M. L. Ins. Co.* v. *McCue,* 223 U. S. 234, 56 L. ed. 419).

Nor is the action against the officer for false return the sole remedy in such case. Naturally, the

plaintiff being a tort-feasor, an action lies directly against him, and to avoid useless circuity of action, it lies against the very wrong complained of, namely, the judgment.

Conclusion.

Quod ab initio non valet tractus temporis non convalescit (what is void in the beginning cannot be cured by waiver, acquiescence or the lapse of time):

Sanborn v. *Sanborn*, 7 Gray (Mass.) 142;

Harris v. *Hardeman*, 14 How. (U. S.) 334, 14 L. ed. 444;

Windsor v. *McVeigh*, 93 U. S. 274, 23 L. ed. 914;

4 Cent. L. I. 68;

Campbell v. *Porter*, 162 U. S. 478, 40 L. ed. 1044;

Shutte v. *Thompson*, 15 Wall. 151, 21 L. ed. 123.

The lower court had the undoubted right, at or after the term, to amend any matter of record to speak the truth; provided of course, where the amendment must be supplied by extrinsic proof, it be done upon due notice and the parties to be affected are given an opportunity to be heard. We do not, of course, mean findings of fact or of law actually made at a term may be set aside after the term, but what was actually done and decided must be truthfully

represented by the record. If this were not true, a clerk by his misprisions could virtually destroy the most important judgments and decrees.

—*Bank of United States* v. *Moss*, 6 How. (U. S.) 31, 12 L. ed. 331.

Most of the things generally shown by a record take place in the judge's presence, and the truth of a matter of record when properly questioned may be either established by the judge's own recollection (which, however, is a very dangerous thing to rely on) or may be gathered from written memoranda, papers or other reliable data on file. On the other hand, there may be matters which occurred outside the court's presence, as the service of process, concerning which the truth can only be established by extrinsic proof. On collateral attack the truth of the record must be conceded, but on a direct attack in the same case, as a motion to vacate the judgment founded thereon, it may be shown to be false:

6 Enc. Pl. & Pr. 151, 179-180.

It may be said that the foregoing statement is inconsistent with our contention that in the present case the officer had no right to make, and the court no power to authorize, an amendment of the return after answer date so as to contradict the original return.

But our contention is based on the ground of estoppel and the principles of due process of law, arising upon the following elements: *(1)* A so-called amendment of a record amounting to a contradiction thereof *(2)* by the person who made it as the record of his own acts, *(3)* the so-called amendment being made without notice to the party adversely affected and *(4)* after the lapse of time when others would have the right to rely on the truth of the record as originally made, *(5)* when the data for the amendment must be supplied extrinsically. We expressly deny the power of the court to authorize such "amendment" under the circumstances enumerated; or even if the fourth element did not exist. *And we deny the power of the court to require* an amended return without the prior application of the officer, especially where the amendment states a falsehood and not the truth.

We furthermore say that the return of an officer ought not to be conclusive; and even if held ordinarily conclusive, the rule does not apply to an amendment made without notice or hearing, or where the false return is procured or induced by the plaintiff; and, therefore, the court below committed error in refusing proof of the falsity of the "amended" return.

We, therefore, respectfully insist that the decision of the court below ought to be reversed with instructions either to set aside the default judgment or to permit plaintiff in error to introduce proof of the falsity of the "amended" return.

Respectfully submitted,

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[illegible]

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 425.

THE STEVIRMAC OIL & GAS COMPANY, a Corporation, - - - - - - - - - *Plaintiff in Error,*

vs.

C. E. DITTMAN, L. H. DITTMAN, J. A. DITTMAN and C. E. DITTMAN OIL and GAS COMPANY, a Corporation, - - - - - *Defendants in Error.*

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

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IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

REPLY BRIEF OF PLAINTIFF IN ERROR ON JURISDICTION OF THIS COURT.

The defendants in error can only challenge the jurisdiction of this court to entertain this writ of error on two grounds, namely:

First. That this is not such a case as can be appealed direct from the District Court to this court.

Second. That the order or judgment of the District Court refusing to vacate the default judgment of December 1st, 1913, is not a final decision, to which a writ of error will lie.

We will take these up in order.

First.

A writ of error lies direct from the District Court to this court in this case.

The application of the plaintiff in error in the court below to vacate the default judgment of December 1st, 1913, was a direct attack upon the jurisdiction of the District Court, because no valid service of process had been had upon the plaintiff in error. This therefore is a case in which the jurisdiction of the District Court, arising upon the question of the validity of the service of process, is directly involved, and the jurisdiction of this court in such a case has been finally and definitely settled beyond all controversy in the case of *Kendall* v. *American Automatic Loom Company*, 198 U. S. 477, 49 L. ed. 1133; the question was there disposed of in the following terse language:

> " It is objected, in the first place, by the appellee, that the appellant had no statutory right

to appeal directly to this court from the order setting aside the service of the subpoena. It is asserted that the case does not involve the jurisdiction of the court below within the meaning of p. 5 of the Act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), inasmuch as the jurisdiction of the Circuit Court as a federal court is not questioned, the jurisdiction being denied upon grounds alike applicable to any other judicial tribunal, state or federal, under the same circumstances. This case is, however, on that point governed by that of *Board of Trade* v. *Hammond Elevator Co.*, (decided at this time) 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740, where it is held that the order is reviewable by this court under the section above mentioned."

That writ of error lies from this court to the District Court to review a decision of the District Court on the question of whether or not the District Court acquired jurisdiction over the person of a defendant is settled in *Merriam* v. *Saalfield*, 241 U. S. 26, and authorities cited. Also see, *Stewart* v. *Ramsay*, 242 U. S. 128; *St. Louis Cotton Comp. Co.* v. *Am. Cotton Co.*, 125 Fed. 196.

Second.

The order or decision of the District Court denying the application of the plaintiff in error, and refusing to vacate the default judgment of December 1, 1913, is a final decision, to which a writ of error will lie.

This proposition is fully supported by the case of *Rust* v. *United Waterworks Company*, 70 Fed. 129, 17 C. C. A. 16. The terse, clear and vigorous opinion in that case seems to us to render any further demonstration of the proposition at our hands a matter of supererogation; but we might approach the subject from a different angle and reach the same result.

In modern practice the summary remedy by motion to vacate the judgment is equivalent to and has almost entirely displaced the remedy formerly afforded by the common law writ of error *coram nobis.*

—*Picket* v. *Legerwood*,
7 Pet. 147, 8 L. ed. 639;
Sibbald v. *United States*,
12 Pet. 492, 9 L. ed. 1169;
Bronson v. *Schulten*,
104 U. S. 410, 26 L. ed. 797;
Phillips v. *Negley*,
117 U. S. 678, 29 L. ed. 1116, 6 Sup. Ct. Rep. 901;

Hickman v. *Ft. Scott*,
141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9;

District of Columbia v. *Humphries*,
12 App. D. C. 128;

Quenn v. *O'Connel*,
7 Ir. Law Rep. 261;

State v. *Calhoun*,
50 Kan. 523, 18 L. R. A. 838, 32 Pac. 38.

The summary motion after judgment authorized by modern practice is much broader in its scope than the old common law writ of error *coram nobis* and permits the court to review and set aside judgments on other grounds than those commonly enumerated for the writ of error *coram nobis*.

Such motion is in effect the institution of a new proceeding, and a judgment thereon is a final judgment.

For instance, it was held by the Circuit Court of Appeals for the Second Circuit, in *United States* v. *New York Central Railroad Company*, 164 Fed. 324, that a motion to abate a judgment is in effect an independent action or proceeding and that from an order entered upon such motion an appeal or writ of error will lie. It will be seen in that case, from reading the majority and dissenting opinions, that the motion to abate the judgment was made to per-

form the functions of the ancient writ of *audita querela,* for the movant attempted to have the judgment abated because of matter of fact occurring subsequently to its entry. The Circuit Court of Appeals held that the lower court had no power to abate the judgment for such reason, but did hold that the order entered on the motion was appealable.

In *Humphries* v. *District of Columbia,* 174 U. S. 190, 43 L. ed. 944, the Supreme Court of the district refused to set aside a judgment on motion to vacate. The Court of Appeals of the district reversed the lower court, and thereupon the case was taken on writ of error to this court, and the writ of error was entertained.

In *Manley* v. *Park,* 187 U. S. 547, 47 L. ed. 296, a Kansas District Court refused to vacate a judgment on motion, and was sustained by the State Supreme Court; a writ of error was sued out from this court, and entertained.

In *Harris* v. *Hardeman,* 14 How. 334, 14 L. ed. 444, a motion was made to set aside a judgment for lack of service of process on the defendant and the motion was sustained. The case was brought up to this court by writ of error and the writ was entertained by this court without any question as to its power to do so. Referring to the power of a court to

act on a motion to vacate a judgment and comparing such a proceeding with a writ of error *coram nobis*, the court said:

> " The judgment by default, therefore, must be regarded as obnoxious to every impeachment of its efficacy which can flow from its having been entered against one who was never a party in court, with respect to the proceedings upon which that judgment was taken. But there is another view of the questions raised in this cause, which is equally, or even more conclusive in favor of the decision now under review. At the time of the motion to the Circuit Court to quash the forthcoming bond and set aside the judgment by default, that judgment was still unsatisfied, and was in the process of execution, the *fieri facias* being sued out therein from the office without any order of the court. The proceedings then, still being as it were *in fieri*, and not terminated, it was competent for the court to rectify any irregularity which might have occurred in the progress of the cause, and to do this either by writ of error *coram vobis* or by *audita querela* if the party choose to resort to the latter mode. If this position be maintainable, then there would seem to be an entire removal of all exception to the judgment of the Circuit Court, as it is believed to be the settled modern practice, that in all instances in which irregularities could formerly be corrected upon a writ of error *coram vobis* or *audita querela*, the same objects may be effected by motion to the court, as a mode more

simple, more expeditious, and less fruitful of difficulty and expense. In this case the cause was still under the control and correction of the court, for the enforcement of its judgment and the supervision of its own process, and in the exercise of this function, it was competent for it to look back upon the entire progress of the case, up to the writ and indorsements thereon, under the rule already stated, as applicable to judgments by default, and to c o r r e c t any irregularities which might be detected."

In *Bronson* v. *Schulten*, 14 Otto 410, 26 L. ed. 797, this court remarked that, as a general rule, a court had no power after the term to set aside, vacate or modify its judgments, but went on to say:

" But to this general rule an exception has crept into practice in a large number of the state courts in a class of cases not well defined, and about which and about the limit of this exception these courts are much at variance. An attempt to reconcile them would be entirely futile. The exception, however, has its foundation in the English writ of error *coram vobis*, a writ which was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. These were limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared

or been appointed, or was a *femme covert* and the like, or error in the process through default of the clerk. See, Archb. Pr.

" In Rolle's Abridgment, p. 749, it is said that if the error be in the judgment itself, a writ of error does not lie in the same but in another and superior court.

" In the case of *Picket* v. *Legerwood*, 7 Pet. 147, this court said that the same end sought by that writ is now in practice generally attained by motion sustained if the court require it by affidavits; and it was added that so far had this latter mode superseded the former in the British practice, that Blackstone does not even notice the writ among his remedies.

" It is quite clear upon the examination of many cases of the exercise of this writ of error *coram vobis* found in the reported cases in this country, and as defined in the case in this court above mentioned, and in England, that it does not reach to facts submitted to a jury, or found by a referee, or by the court sitting to try the issues; and therefore it does not include the present case."

It is indeed true, as a general rule, that in the absence of statute the court has no power after the end of the term to set aside, vacate or modify its judgments, but to this there is a well established exception, namely: that a judgment rendered without

jurisdiction may be and ought to be vacated at any time when the court's attention is called thereto.

—*United States* v. *Wallace*,
46 Fed. 569;
Clark v. *Savings Association*,
217 Fed. 640;
In re. Dennett,
221 Fed. 350, 136 C. C. A. 422;
Ex parte Crenshaw,
15 Pet. 119, 10 L. ed. 682.

While it is true that originally the writ of *coram nobis* did not contemplate the case of a judgment rendered without service of process, still there is no reason why the modern motion to vacate the judgment should not, by analogy, be extended to such cases; and as has been seen in the case of *Harris* v. *Hardeman*, *supra*, it has, in practice, been extended to such cases.

If the court had jurisdiction to render the original judgment, such judgment, no matter how erroneous it might be held to be when appealed from directly, is a final judgment, and no appeal lies from any order refusing to vacate same. But, if the court had no jurisdiction to render the judgment, then upon proper application it is the duty of the court to set the same aside, and the order refusing to vacate the judgment is a final decision and reviewable on appeal.

In this view, if the court had no jurisdiction to render the original judgment an application to vacate the judgment may be considered a new proceeding and an order denying such application would in that view be final and reviewable, and herein lies the distinction between an order which may be final and reviewable and one which may not be.

In *Blyth & Fargo Co.* v. *Swenson*, 15 Utah 345, 49 Pac. 1028, it was held that an order refusing to vacate judgment entered without the service of process was a final judgment and appealable. The court said:

> " The respondent also moves the court to dismiss the appeal from the order overruling the motion to set the judgment aside, because no appeal lies, as alleged, from such an order. A judgment against a party not served with process who did not appear in person or by his attorney, is without any binding effect; and though the process against him may have been returned as served, or the record may show his appearance, if in fact he was not served, and did not enter his appearance or authorize it to be done, he may, upon learning of the judgment, move the court to set it aside, and upon sufficient proof the court should grant the motion. A judgment in such a case, without the service of process or appearance, would not be due process of law, under the constitution of this state or the Constitution of the United States. And the sale of defendant's

property by virtue of an execution issued upon such a judgment, if sustained, would deprive him of his property without due process of law. A judgment appearing from the record to have been entered against a defendant without service of process or appearance is void on its face, and may be set aside at any time by the court. It is absolutely void. And if from the record it appears to have been rendered upon process duly served, or upon appearance, when it was not so rendered, the court should set it aside, as void, upon proof that the process was not served and that there was no appearance. A motion to set a judgment aside, fair on its face, for want of service of process or appearance, is, in effect, the same as a bill to set a judgment aside for the same reason. In the latter case there can be no doubt as to the right of appeal from an order refusing to set the judgment aside, and such a decree must be regarded as a final judgment, and appealable. We think an order denying a motion to set aside a judgment, for the same reason, must be regarded as a final judgment, and appealable. It would be very unreasonable to hold that errors by the trial court in overruling motions to set aside judgments entered against a defendant without notice or appearance should be reviewed on appeal or not reviewed at all."

The distinction is pointed out also in *the Matter of Get Young*, 90 Cal. 77, 27 Pac. 158, which we quote in full (italics ours):

" This is an appeal from an order refusing to revoke an order granting letters of guardianship of a minor. The order made by the probate court appointing the guardian, was one which it was within the jurisdiction of that tribunal to make, and it was itself appealable. Section 963, Code Civil Proc., subd. 3. Hence the appellate court will not entertain jurisdiction of the appeal now here. *Goyinech* v. *Goyinech*, 80 Cal. 409, 22 Pac. Rep. 175; *Larkin* v. *Larkin*, 76 Cal. 323, 18 Pac. Rep. 396; *Railroad Co.* v. *McGrath*, 74 Cal. 49, 15 Pac. Rep. 360; *Tripp* v. *Railroad Co.*, 69 Cal. 631, 11 Pac. Rep. 219. *The matter does not come within the rule as to void judgments*, laid down in *People* v. *Greene*, 74 Cal. 400, 16 Pac. Rep. 197. We therefore advise that the appeal be dismissed."

In *Thompson Manufacturing Company* v. *Guenther*, 5 S. D. 504, 59 N. W. 727, the court said:

" If the order of July 13th were simply erroneous an appeal from the subsequent order refusing to vacate it would be dismissed, under the rule invoked by respondent; but as we intimated in *Vert* v. *Vert*, (S. D.) 54 N. W. 655, there seems to be no good reason for holding such rule imperative, where the first order was one which the court or judge had no jurisdiction to make, although the rule is often broadly stated without such qualification. An order erroneous, and therefore voidable becomes established and operative as a valid order if not attacked within

the time prescribed by statute, but a void order is a nullity, and always remains so. No rights can ever be built upon it. Neither party can be prejudiced by striking such an order from the records, for it is binding neither upon the court nor the parties. Every court of general jurisdiction has inherent power to purge its records of such an order. Black, Judgm. 307, and cases cited; Freem. Judgm. 98, and cases cited. A party against whom such an order or judgment is entered, has a right to have it vacated, upon proper application to the court which made or rendered it. Black, Judgm. 318, and cases cited. The court having made the order of July 13th without jurisdiction, it should have vacated it on appellants' motion."

In *Baldridge* v. *Baldridge,* (Ky.) 117 S. W. 253, it was held that an order refusing to set aside a void judgment was a final decision and appealable.

In *Michigan Insurance Co.* v. *Whittemore,* 12 Mich. 311, it was held that an appeal lay from an order in chancery refusing to set aside a decree for irregularity.

In *Hamilton* v. *Shillington,* 19 App. (D. C.) 268, it was held that an order refusing to vacate a previous order, passed without notice to the petitioners, was appealable and that the later order and not a prior order was the final order or judgment in the case.

As we have said, in modern practice the motion to vacate the judgment is not as limited in scope as the old writ of error *coram nobis;* it has been made to perform the functions of both the writ of error *coram nobis* and of *audita querela.* But whether the proceeding be by motion or by writ, it is in effect a separate proceeding after judgment and if it results in a refusal to vacate the judgment, in a case where it should have been vacated, it is a final judgment.

In Illinois the writ of error *coram nobis* has been abolished by statute.

> " But while the statute abolished the writ it did not abolish the essentials of the proceeding, which in nature remained the same."
>
> —*Mitchell* v. *King,*
> .... Ill. ....., 55 N. E. 637.

That is to say what was formerly done by the writ is now accomplished by motion. In federal practice, though there has been no statute abolishing the writ, the same thing is true. The Illinois court in *Mitchell* v. *King, supra,* discusses the analogy between the proceeding by a motion after the judgment and the proceeding formerly by a writ of error *coram nobis,* and shows that it results in practically the same thing, namely: the judgment for or against the applicant upon the issue made by the motion either

upon questions of law or of fact. We quote from the opinion in that case:

> " By our statute the writ of error *coram nobis* has been abolished and errors in fact committed in the proceedings of any court of record, and which by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, by motion in writing. *Id.* 66. But, while the statute abolished the writ it did not abolish the essentials of the proceeding, which, in nature remain the same. A writ of error is a new suit, in which original process is issued and served, and new pleadings are made up. The assignment of error stands in the place of the declaration, and *it is still necessary, in the form of a motion, to allege and show an error in fact, and for the opposite party to have notice.* The defendant may, of course, admit the matter alleged, and submit the question of error to the court as a matter of law, or may deny the fact, or plead the statute of limitations against the motion. In either case an issue is made up, and there must be a finding and a judgment. If the alleged error is proved and there is judgment for the plaintiff in error, it is that for such error the judgment be recalled and annulled. In this case there was judgment against the party making the motion in the Superior Court, and the issue made by the motion was taken to the appellate court. The original case was not in the appellate court, but only the motion in the nature of the writ of error *coram nobis.*"

In analogous proceedings after judgment authorized by the Arkansas law (Kirby's Digest, Sec. 4431), it has been held that such proceedings constituted in effect an independent action and the judgment therein is a final judgment and appealable.

—*Norman* v. *Commack*,
105 Ark. 121, 150 S. W. 563;
Blackstad Merc. Company v. *Bond*,
104 Ark. 45, 148 S. W. 262;
Ayers v. *Anderson-Tully Company*,
89 Ark. 160, 116 S. W. 199.

In the case of *Smith* v. *Stiles*, 68 Wash. 345, 123 Pac. 448, it is held that an order denying the motion to vacate the judgment was a final order and appealable, and it was furthermore held that a petition, under the statute, commenced by service of summons to vacate the judgment, was an independent action and the judgment therein was a final judgment. In the present case the appeal of exception shows that upon the hearing of the motion the plaintiffs (defendants in error) appeared and objected to the granting of the motion.

We cite the above cases merely as an illustration by way of analogy, for in those cases we do understand that it was contended that the judgments sought to be vacated were void for lack of jurisdiction.

But we think this whole question has been adequately disposed of by the Circuit Court of Appeals for the Eighth Circuit in *Rust* v. *United Waterworks*, 70 Fed. 129. There a default judgment was taken and the receiver of the defendant corporation filed a petition to vacate the judgment and for leave to plead to the jurisdiction of the court and make such other defenses as he might be advised. Though the proceeding was by petition (so-called), it was filed in the same case and was in effect the same as a motion. From a judgment denying the petition, an appeal was taken. On motion to dismiss the appeal the court said:

> " Before considering the merits of this case, it is necessary to dispose of a preliminary question. The defendant in error challenges the jurisdiction of this court to hear and determine the questions presented by the assignments of error. It moves to dismiss the writ of error on four grounds. * * * *2.* Because the judgment which denied the prayer of the petition of the plaintiff in error was not a final judgment or decision. But that judgment denied the plaintiff in error all relief in the action in which he filed his petition, and finally determined all his rights therein. A final decision, which completely determines the rights, in the suit in which it is rendered, of some of the parties, who are not claimed to be jointly liable with those against whom the suit is retained, and a final decision which completely

determines a collateral matter distinct from the general subject of litigation, and finally settles that controversy, is subject to review in this court, by appeal or writ of error. *Standley* v. *Roberts*, 8 C. C. A. 305, 59 Fed. 836; *Central Trust Co. of New York* v. *Marietta & N. G. Ry. Co.*, 1 C. C. A. 116, 48 Fed. 850; *Grant* v. *Railroad Co.*, 1 C. C. A. 681, 50 Fed. 795; *Potter* v. *Beal*, 2 C. C. A. 60, 50 Fed. 860; *Jacksonville, T. & K. W. Ry. Co.* v. *American Construction Co.*, 6 C. C. A. 249, 57 Fed. 66; *Withenbury* v. *U. S.*, 5 Wall. 819; *Williams* v. *Morgan*, 111 U. S. 684, 4 Sup. Ct. 638; *Hill* v. *Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. 690; *Forgay* v. *Conrad*, 6 How. 201, 204; *Bronson* v. *Railroad Co.*, 2 Black 524, 529; *Thomson* v. *Dear*, 7 Wall. 342, 345; *Trustees* v. *Greenough*, 105 U. S. 527. *3.* Because the plaintiff in error was not a party to the action in the case of the *United Waterworks Company* v. *The American Waterworks Company*, in which the judgment was rendered by default against the latter company, and therefore was not entitled to a writ of error to review that judgment. But the plaintiff in error was a party to his own petition for the vacation of that judgment and for leave to defend that suit, and to the judgment which finally denied him any of that relief. It is the latter judgment which he seeks to review, and that he is entitled to have reviewed by this court through this writ."

We respectfully submit that the writ of error should be sustained and the judgment of the lower court reversed.

GEO. S. RAMSEY,
EDGAR A. DE MEULES,
MALCOLM E. ROSSER,
SOL H. KAUFFMAN,
Attorneys for Plaintiff in Error.

[redacted]

No. [redacted]

In the

Supreme Court of the United States

October Term, 1915.

THE STEVENAC OIL & GAS CO., a Corporation,
Plaintiff in Error,

vs.

C. E. BITTMAN, E. E. BITTMAN, J. A. BITTMAN and C. E. BITTMAN JR. & GAS CO., a Corporation,
Defendants in Error.

In Error to the United States District for the Eastern District of Oklahoma.

BRIEF OF DEFENDANTS IN ERROR.

C. E. Bittman,
Tulsa, Okla.
John H. Wise,
William E. Mitch,
Pawhuska, Okla.

[redacted]

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In the

Supreme Court of the United States

October Term, 1916.

No. 425.

THE STEVIRMAC OIL & GAS CO., a Corporation - - - - - - - - - - - - Plaintiff in Error

vs.

C. E. DITTMAN, L. H. DITTMAN, J. A. DITTMAN and C. E. DITTMAN OIL & GAS CO., a Corporation - - - - - - - - - - - - Defendants in Error

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In Error to the United States District for the Eastern District of Oklahoma.

BRIEF OF DEFENDANTS IN ERROR.

Additional Statement of Case.

There are a number of things in this case which were known to the trial court, and which are not set

out in the statement of the case by plaintiff in error. On the twenty-third day of July, 1914, Holmes Davidson, a deputy marshal, who served the summons in this cause, was killed at Tulsa, by one Baber..

ARGUMENT.

The Court's attention is directed to the affidavits of Virgil Hicks and H. H. McFann, which were attached to the special appearance and motion to set aside judgment of defendant in error, which motion was filed May 18, 1915. (Rec. pp. 28-35) Nowhere in either of said affidavits is there any denial, but that Virgil Hicks was, at the time of the service of the summons in this case upon him, the Treasurer of The Stevirmac Oil and Gas Company; therefore that fact is admitted, and the only question that can now be considered by this Court is, is that service sufficient.

The Court's attention is also directed to the original return made by the marshal, which, standing by itself, would indicate the intent of said marshal, which reads: "I delivered a copy of this writ to Virgil Hicks, Tres. in person, at Sapulpa," and on the first day of December, 1913, at which time The Stevirmac Oil & Gas Company was in default when the Court's attention was called to said return the Court ordered the marshal to amend his return as shown on page 27 of the record. This amended return is in compliance with the statute of Oklahoma

relative to service on corporations. On page 17 of the brief of plaintiff in error is a correct copy of the statute in regard to service of summons on a corporation. Plaintiff in error has attempted to quote the law relative to service on corporations, and says that a summons for a corporation can be served on its cashier, etc., only when the President, etc., cannot be found in the jurisdiction. In the case of *Cunningham* v. *Rover*, 25 Okla. 133, 105 Pac. 676, by counsel, it was admitted that the sheriff had met and conversed with the President of said company. In the case at bar there is no such admission, and in the *Cunningham* v. *Rover* case the sheriff had found the President, but in the case at bar there is no attempted showing that the marshal did find the President, and it might have been true that he was in the district.

In the case of *Ozark Marble Co.* v. *Still*, 24 Okla. 559, 103 Pac. 586, the court said, on page 560:

> "If, upon the hearing of defendant's motion to vacate and set aside the default judgment, plaintiff had made a showing that the facts were such that such officer could not be found in the county and service could not be had upon him, and had asked leave to have the officer's return amended to conform to such facts, it would have been the duty of the trial court to have granted such leave, but no such request of showing was made.

In the case of *Palmetto Town Co.* v. *Rucker* 1 Kas. 561, the court held that the service of

> the summons, as shown by the return, was defective, and that under the statute in force in that state, which is the same statute that is in force in this state, the return should have stated that the President or other chief officer could not be found in the county; but the court held that, since the defect in the return of the officer failing to show valid service might be such a one as could have been remedied by amendment in the trial court, and the defendant had not in any manner invoked the aid of the trial court to relieve him from such default, the appellate court would give him no relief on appeal."

At this point we desire to call the Court's attention to the date when the affidavits and motion were filed. These were filed on the eighteenth day of May, 1915, almost a year and a half after the judgment had been rendered. Unquestionably plaintiff in error has been guilty of laches, and furthermore these affidavits were inadmissible for any purpose. The Supreme Court of Oklahoma, and on the law side the United States Supreme Court follow the State Supreme Court's decision, has decided in the case of *Conklin* v. *Yates*, 16 Okla. 266, 83 Pac. 910, in passing upon the question of testimony relative to conversation had with a deceased person says:

> "Counsel for plaintiff in error argues that the statute forbids only communications had personally with the deceased; that is, that the statute only contemplates preventing one party from testifying as to conversations had with

the deceased. We do not agree with this contention. The evident purpose of the statute is to prohibit a party testifying in his own behalf in respect to any transaction or communication had with a deceased person individually. To hold otherwise would open the door for a greater fraud, and this because the lips of the adversary are closed by death, and he cannot be heard to give his version of the conversation."

Cunningham Admr. v. *Phillips,* 4 Okla. 169, 44 Pac. 221.

Wadleigh v. *Parker,* 34 Okla. 213, 124 Pac. 957.

McDonald v. *McLaughlin et ux,* 32 Okla. 584, 123 Pac. 158.

Vance v. *Whitten,* not yet officially reported; 151 Pac. 567.

All conversation had by Hicks and McFann is purely hearsay and could not have been admitted, even though the statute of Oklahoma permitted conversations with deceased persons. The affidavit of Mr. Hicks being an attempt to evade the statute, would be likewise inadmissible.

Passing now to the second point, on page 29 of plaintiff in error's brief, they say that the word, "Tres" after the name Virgil Hicks is a suspicion that Hicks was not served in his individual capacity. It would seem that the word "Tres" absolutely and unqualifiedly fixes in which capacity Mr. Hicks was being served. Had the word "Tres" not been af-

fixed, then it would surely be competent to show in what capacity he was served. Counsel state that the word "Tres" is unintelligible and at most was a mere descriptio *personae*. We do not think it necessary to cite any decisions to the effect that "Tres" has been and always will be short for "Treasurer," and if it was *descriptio personae*, then it surely indicates in what capacity he was served.

Counsel seem to lay considerable stress on the case of *Cornell* v. *Green*, 95 Fed. 334, and quote a part of that decision. Let us quote a little more in this case and see what it says:

> "On the face of the subpoena William F. Tucker is not mentioned as the guardian of any person, but he is named as an executor. It is stated in the return that the marshal served this writ by personally delivering a true and correct copy thereof to William F. Tucker, on the 8th day of December, 1875. *The recital by the marshal as to the character in which William F. Tucker was served is an immaterial matter.* The copy of the writ placed in Tucker's hands gave him the information, namely, that he must come into the court and make whatever defense he had to the bill."

Had the amendment not been made as required by order of the court there might have been some question as to whether or not the marshal intended to serve Virgil Hicks personally, or the corporation.

In the case of *Odell* v. *Reynolds*, 70 Fed. 656, relied upon by counsel, the court says:

> "On the contrary it is a power inherent in the authority of every court having jurisdiction to correct errors in the making up of its records whereby they fail to express the truth in regard to its proceedings. And this power may be exercised by the court at any time when the error is brought to its attention, and no injury is likely to happen to the parties or other persons in its exercise. * * * If the power to amend exists by reason of the original jurisdiction in the case, it is difficult to see how there is more than mere error, at all events, in dispensing with notice."

We desire to call attention to the case of *Little Rock Trust Co.* v. *S. M. & A. R. Co.*, 195 M. 669, 93, wherein the court says: "The right to amend a return rests in the sound judicial discretion of the court." In the case at bar the court has exercised its descretion by ordering and allowing the amendment. More than a year and a half has elapsed from the time of the entering of the default judgment until plaintiff in error filed its motion. There had been other proceedings in this action which are not now before this Court, and of which the lower court had knowledge and took judicial notice. Those proceedings were had in an entirely different action growing out of the judgment rendered in this cause, and it is a rule of law that a party cannot sit idly by when some process has been served upon it and then after

a judgment has been entered come in and ask this court to set aside said service. In Black on Judgments, Sec. 224, the rule is laid down very clearly wherein he says:

> "Although the service of process in an action may have been characterized by some defect or irregularity, it does not necessarily follow that the ensuing judgment will be void. For if the party would take advantage of such a matter, he must do so in the action itself by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all, that there can be said to be a want of jurisdiction."

In the case at bar there is no question but what Virgil Hicks was a person who could be served under the Oklahoma law. The fact that the President was within the district is not the rule by which service is determined. A summons could be issued against a person, and it is done daily in the United States, and returned by the sheriff "not found," when the defendant is within the jurisdiction of the court. The marshal is not here now to tell whether or not he went to the office of Mr. McFann, but it is a fact that Mr. McFann did not see the officer. There is a difference between this case and the case of Cunningham v. Rorer, *supra*. If that be the rule, and we must respectfully say that it is, then plaintiff in error was properly served with summons. The Supreme Court of Illinois has passed directly upon this question under a statute exactly like that of

Oklahoma, and we desire to quote from their decision in the case of *Chicago Elec. Underground Co.* v. *Congdon Brake Shoe Mfg. Co.*, 111 Ill. Rep. 309, they say:

> "Under Rev. St. 110, Chap. 5, which provides that a corporation may be served with process by leaving a copy with its President, if he can be found in the county, otherwise on certain other officers, service on such other officer is binding on the corporation if the President cannot be found in the county, even though he is at the time actually in the county."

The case of *Groff* v. *Warner*, 44 Ind. App. 544, 89 N. E. 609, was a case where the secretary of the corporation was served. The president was at that time within the sheriff's bailiwick, but the sheriff made his return that the secretary was the highest officer of said corporation found within his bailiwick. The section on service of process against corporations of Indiana is identical with ours. It reads as follows: That "the process against either a domestic or foreign corporation may be served on the president, presiding officer, chairman of the board of trustees, or other chief officer, or if its chief officer is not found in the county, then upon its cashier, treasurer, director, secretary, clerk, general or special agent."

In the Indiana case the president made affidavit that he was not served with summons, that he resided in the county with the sheriff, and that he knew

nothing of it until after judgment was rendered. Other affidavits were filed, but the court in passing upon the question of whether service had been made held:

> "It is claimed that it was the duty of the sheriff under the circumstances to serve the summons upon the president of the corporation, but this cannot be treated as an attack upon the jurisdiction of the court, which is conclusively established by the sheriff's return, although, in fact, admitted that there was such service upon the corporation as gave the court jurisdiction over it, but it is contended that, as the statute required the sheriff, under the facts stated, to serve the president instead of the secretary, and as the officer who should have been served had no knowledge of the pendency of the action, the corporation should be regarded as having no excuse for failure to appear."

In the case of *Goddard* v. *Harbour,* 46 Kas. 744, 44 Pac. 1055, the court said:

> "In England it has been the established law from a very early day that the return is conclusive as between the parties, and that the remedy of a party injured by a false return is by an action against the sheriff on his official bond, in which case alone the truth or falsity of a return may be inquired into. (19 Vin. Abr. 210; 6 Con Dig. 242.) In this country there is much diversity of judicial opinion on the subject, but the decided weight of authority seems to support the position that as to matters falling within the personal knowledge of the sheriff, his

return is conclusive as between the parties to the record, unless the falsity of the return is disclosed by some portion of the records of the case.

In Smith's Leading Cases, Hare & Wallace (1 Smith leading case 842) is was said: 'Whatever the rule may be where the record is silent, it would seem clearly and conclusively established by a weight of authority too great for opposition, unless on the ground of local and peculiar law, that no one can contradict, that which the record actually avers, and that a recital of notice of appearance or a return of service by the sheriff in the record of a domestic court of general jurisdiction is absolutely conclusive, and cannot be disapproved by extrinsic evidence.'

Much can be said by way of argument for and against the rule which makes the sheriff's return conclusive. When there is a return of personal service ordinarily the person served will be the only witness who can flatly contradict it, unless the officer himself does so. To set aside and annul a judgment duly entered on such slight proof of what can hardly be termed more than a technical defect in the service, is certainly establishing a bad precedent, and in our view, a much more dangerous one than the rigid rule which we deem best to follow in this case. The hardships which may possibly result from the rule adopted are not so great nor so probable as might at first appear. When it is considered that the sheriff acts under oath and is responsible on his official bond. If he makes a mistake the court to which the process is returned may permit him to amend. In giving conclusiveness to a sheriff's return, as to those matters coming within his personal knowledge,

> we do no more than give it the same credit as the parts of the record written by the clerk, any of which may be corrected under the direction of the court when application is duly made, but cannot be contradicted by parole testimony."

The question of the truth or falsity of the return of the marshal is conclusive upon the question of service. He, and he alone, knew whether or not he could find the president of said corporation, which his amended return shows conclusively, and courts go to great lengths to uphold and sustain their judgments. If the affidavit of Mr. Hicks could be admitted it would be his word against that of the marshal, and most certainly the court would sustain that of its officers. It did, on the hearing and reading of the affidavits, believe that the officer who served this process did it in accordance with law, and that his return was the truth, and now that his lips are sealed in death, plaintiff in error's officers cannot after a lapse of a year and a half be heard to say that this company was not properly served with summons.

Passing now to the question as to whether or not the marshal could amend his service, we quote from the Supreme Court of Oklahoma in the case of *Osborne & Co.* v. *Hughey,* 14 Okla. 29, 76 Pac. 146:

> "Every court has inherent power to control its own process, and when a return is made not in accordance with law, the court has power to

vacate, set aside, or cause such return to be corrected."

The Supreme Court of Georgia, in *Jones* v. *Bibb Brick Co.*, 120 Ga. 321 48 S. Eastern 25, says:

"If there has been good service, but an irregular or incomplete return, the defect may be cured by an entry making the return conform to the facts, and thus save what is in reality a judgment based on valid service.

If, however, the fact of service appears, and the officer's return is irregular or incomplete, it should not be treated as no evidence, but rather as furnishing defective proof of the fact of service. The irregularity may be cured by an amendment which does not make or state a new fact, but merely supplies an omission in the statement as to an existing fact. Where there has been valid service and no return, the deficiency may be supplied before taking further steps in the cause. If there has been service, and a voidable or defective return, it may be amended even after judgment, so as to save that which has been done under service valid in fact, but incompletely reported to the court; for in its last analysis it is the fact of the service, rather than the proof thereon by the return, which is of vital importance. * * * This right to amend a "return" so as to make it conform to the facts is allowed on general principles and by our statute. * * * * Under the authorities, therefore, it is evident that the defective return might have been amended to conform to the facts, and that such amendment, when made, would have related back so as to make the record complete and the judgment

> perfect. * * * * The presumption in favor of the validity of judgments and all the analogies of the law tend to sustain the proposition that a judgment once rendered can only be successfully attacked by proof that it is void. This proof sometimes appears from facts on the face of the record, or from the failure of certain other facts to appear in the record."

In *King* v. *Davis*, 137 Fed. 209, the court quoted approvingly from the case of *Shenandoah R. C.* v. *Ashby*, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898, where an invalid return of service of process was allowed to be amended thirteen years after a default judgment founded on such return; Judge Lewis saying:

> "The case is not within the principle that proceedings which are void *ab initio* cannot be rendered valid by amendment, for here the effect of the amendment was not to confer jurisdiction upon the circuit court, but only to perfect the proof of the jurisdiction which it had previously acquired, but of which the evidence prescribed by the statute was wanting."

In *Stone* v. *Wilson*, 10 Grat. 533, Judge Moncure said:

> "A court from which process is issued may permit the sheriff's return thereon to be amended at any time, even though a suit or motion founded on the original return be then pending, and even though the proposed amendment be inconsistent with the original return,

and take away the foundation of the suit or motion."

The Supreme Court of Oklahoma in the case of *Payne* v. *Long Bell Lbr. Co.*, 60 Pac. 237, 9 Okla. 683, held that it is always proper for a sheriff to amend his return, and he is allowed great liberality in doing so. They say:

> "It is always proper and competent for the sheriff to amend his return in order that it may speak the truth. The power to amend the return of a sheriff should be liberally construed, and with a view of promoting justice. Mistakes are made, and these mistakes may consist either of the omission or the incorrect statement of some material fact. If the officer in making his return has discovered that he has committed an error, or has failed to state some material facts in relation thereto, he should make application to the court and amend his return for the purpose of obtaining a record which contain the exact truth."

Mr. Freeman in his excellent work on Execution, Sec. 360, says:

> "It has sometimes been said that an amendment will not be permitted when it will destroy or materially alter the effects of the original return. But this is a mistaken view. If an amendment does not alter the return in some material respect, it is hardly worth seeking permission to make it. Returns are constantly amended and their whole nature is often materially transformed by cancelling the old return and substituting therefor a return of an

> entirely different character. When an amendment is made, the return as amended is to be given the same effect as though it had first been put in its present form."

In the case of *Ford* v. *Delta & Pine Land Co.*, 43 Fed. 181, where the service was more defective than in the instant case, and where the return in that case on the summons was as follows: "Executed November 19, 1885, by handing to R. A. Murdock, Esq., of Okolona, Miss., a true copy of this writ"; judgment was rendered against the Selma, Marion & Memphis R. R. Co., property of this company was sold and a motion was made to set aside the sale on the ground that the service was void. There was no indication on the return as to what position, if any, Murdock held with the railroad company. The court said:

> "A return of process, defective on its face, in that it does not show the relation of the person served, to the defendant corporation, is cured by a recital in the judgment that the defendant had been duly and legally served with process."

Referring to the judgment obtained (page 26 of the transcript), which is as follows: "It appearing to the court that said defendant (The Stevirmac Oil & Gas Co.) has been duly notified, according to law, of the pendency of this action," it is there to be seen that said judgment recited the fact of the service on the defendant; the case of *Ford* v. *Delta Pine*

Land Co., supra, held that where a judgment recited that the defendant had been legally served, this would cure any defect in the service; in the case at bar, the judgment did recite that said defendant had been notified according to law, and if for no other reason the judgment of the lower court must be affirmed in this court, as the entry of judgment cured all said defects in the return.

One of the latest expressions of the Supreme Court of Oklahoma is the case of *M. Rumeley Co.* v. *Bledsoe et al,* 155 Pac. 872, ___ Okla. ___. In this case summons was served on A. M. Thomas, the agent for the M. Rumeley Company; no appearance was made, and judgment by default was rendered upon the answer day. The court said:

> "The return under consideration does not show that A. M. Thomas comes within the class of officers or agents designated by the statute, and therefore the service upon its face is void; but this return was amendable, and if Thomas had actually belonged to any one of the classes designated in section 4715, the return, if it had been challenged in the court from which the summons was issued, could have been amended so as to make it speak the truth. And if such was the case, we could, under this proceeding, consider the amendment as made, and would unhesitatingly deny the relief prayed for."

We desire to call the Court's attention to that decision wherein it says that if Thomas belonged

to any one of the classes designated in section 4715, the return, if it had been challenged in the court from which the summons was issued, could have been amended so as to make it speak the truth; Hicks was a person belonging to one of the classes designated in section 4715; he was the treasurer of the plaintiff in error, when the return was challenged in the court out of which summons had been issued, to-wit, the Federal Court for the Eastern District of Oklahoma, and when it was there amended to make it speak the truth the service on plaintiff in error was complete; the Supreme Court of Oklahoma further said that if "he did belong to any one of the classes, they would consider the amendment as made," but in this case the amendment was made and the service was valid.

The case of *Cornwall* v. *Star Bottling Co.*, 128 Mo. App. 163, 106 S. W. 591, is a case directly in point:

> "Defendant is a corporation. The action was to recover a balance of $150.00 on account. Defendant moved the court to quash the sheriff's return of the summons, for the reason 'that no summons was ever served upon the defendant'; that no copy of summons and petition was ever left with Wm. Freudenau, secretary of the defendant company; that Alex B. Grant, president, and J. Wm. Taylor, vice president of the defendant company, resided and maintained offices in the city of St. Louis, Mo., and were present in the city of St. Louis and could

readily have been found by the sheriff for service of summons in this cause.' Affidavits were filed in support of the motion. The motion to quash was overruled, and defendant declining to plead further, or to appear to defend the action, judgment was rendered against it by default. A motion to set aside the judgment by default was filed and overruled, whereupon defendant appealed.

The sheriff's return is as follows: 'Served this writ in the city of St. Louis, Mo., on the within named defendant, the Star Bottling Co. (a corporation), this 17th day of December, 1906, by delivering a copy of the writ and petition as furnished by the clerk to William Freudenau, secretary of the said defendant corporation, he being in said defendant's usual business office and in charge thereof. The president or other chief officer of said defendant could not be found in the city of St. Louis at the time of the service.' Defendant's contention is that the judgment was irregular in that the sheriff's return 'does not show that the president or other chief officers could not be found in the city of St. Louis, as required by statute. It avers that they could not be found at the time of service. *Non constat.* that they might have been found at some other hour of the same day, or at some other day in time for service.' Section 995 of the Rev. Stat. 1899, provides that service of summons on a corporation shall be made on the president or other chief officer of the company, or in his absence by leaving a copy of the petition and summons at any business office of the company with the person having charge thereof. Section 996 requires the sheriff to express in his return on whom, how

and when the summons had been executed, 'and if not on the chief officer, he shall express the absence of such officer or that he cannot be found.'' The affidavits filed in support of the motion to quash the return are to the effect that both the president and vice president of defendant maintained offices in the city of St. Louis, and were almost continuously in the city for six months prior to the date the affidavits were made, February 21, 1907.

William Freudenau, secretary of the company, filed an affidavit denying *in toto* the truth of the return and stating that the first intimation he had that suit had been brought was after judgment had been rendered. It is no longer a debatable question in this state that when the officer's return to a summons shows service in the manner prescribed by statute, it is conclusive as to the parties to the suit, and if the return is false in fact, the remedy of the party injured is by suit on the officer's bond. Therefore, the affidavits filed in support of the motion to quash were inadmissible as evidence and were properly disregarded by the trial court. But it is contended that the return does not show the president, or other chief officer of the company, was absent from the city of St. Louis, or could not be found in said city. The statement in the return that the president or other chief officer could not be found in the city of St. Louis, on the day the service was made is conclusive of the fact, and the fact that the president or other chief officer might have been found on some other day does not vitiate the return.''

Counsel for plaintiff in error lay great stress upon the proposition that they had no notice of the

amendment to the return. It would be a strange proceeding that when a valid service is once made, and a defect in the return, that it would be necessary for the plaintiff to go out and seek the defendant and learn from him if he had an attorney and then bring the attorney into court before the amendment could be made. If this were true, after service had once been made, the defendant might hide or leave the jurisdiction of the court and the service and judgment would be ineffective.

Section 4790 of the Statutes of Oklahoma, relating to amendments, is as follows:

> "The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts proved, when such amendment does not change substantially the claim or defense; and when any proceeding fails to conform in any respect to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

There is nothing in this section which says anything about notice, but says the court before or after judgment may amend any pleading, process, etc., and this code further says same may be amended in any respect. So, in this case, where the only object

of the amendment was to have the return conform to the requirements of the statute, it could be done and was done in the furtherance of justice, and if the legislature deemed notice necessary it could very easily have inserted it, but not having done so, allowed the court the right to exercise his discretion, which was done in this case.

In the case of *El Paso & S. W. Ry. Co.* v. *Kelly*, 83 S. W. 855, the court of civil appeals of Texas held upon a return amended by the sheriff without notice to the defendant, but on order of the court, that no notice was necessary. Service was made, and the return showed service on H. J. Simmons, local agent of the El Paso & S. W. R. R. Co., and the amended return showed service on the El Paso & S. W. R. R. Co by H. J. Simmons, local agent, and by leaving a copy of the summons at the principal office of said company with said Simmons. As to whether a return must show all the facts necessary to comply with the statute, if it is not denied but the party served was a party who could be served, the court said:

> "But, however this may be, as we have seen that the return of service on the agent of a corporation need not show all the facts set out in the statute which provide such service, but it is sufficient if they are shown from the records, when we look to the findings of the court recited in the judgment it seems clear that J. H. Simmons was, at the time citation was served, the local agent, representing the El Paso Terminal Railway Company in the city of El Paso, Texas.

* * * * In this connection we will state, that in our opinion, the affidavits attached to the motion, attacking the validity of the amended return, are insufficient to that end, when the findings of fact by the court embodied in the judgment are taken and considered in connection with it.

We know of no authority holding that a return on a citation cannot be amended without notice to defendant. The statute simply provides that any mistake or informality in a return may be corrected by the officer at any time under the direction of the court. If the facts regarding the service were such as constituted it good, it would be strange if, when a return is defective, the law should require service of notice on the defendant as a condition precedent to the correction of the return, before judgment by default could be taken.

It is shown that the amended return is attached to the citation, and as it relates back to the time service was actually had, it is regarded as filed, when the citation was filed in the district court.

We, therefore, conclude that the citation and return thereon was sufficient to give the court jurisdiction of the persons of defendants."

In conclusion we must respectfully insist that the service made on Mr. Hicks as treasurer of said company, was valid, and that the amendment ordered by the court was regular and the return of the marshal as amended being in compliance with the statute of Oklahoma, cannot now be questioned and that no notice was necessary; and further, the marshal

now being dead, no evidence of any character could be introduced to impeach or overthrow his service. The marshal was under bond and most certainly when Mr. Hicks had been served and afterward talked to Mr. McFann, it was then the duty of these officers to investigate said matter and not permit judgment to be taken against said corporation, if they had any defense.

On passing on the motion by the lower court the finding of fact based partly upon the affidavits and partly on the fact that no evidence could be introduced against the officer, he being now dead, is conclusive.

We therefore respectfully ask that the judgment of the lower court be affirmed.

Respectfully submitted,

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